Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)))))	CC Docket No. 01-338
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	))))	CC Docket No. 96-98
Deployment of Wireline Services Offering Advanced Telecommunications Capability	))	CC Docket No. 98-147

REPLY COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES CBEYOND COMMUNICATIONS, LLC DSLNET COMMUNICATIONS, LLC EL PASO NETWORKS, LLC FOCAL COMMUNICATIONS CORPORATION NEW EDGE NETWORK, INC. PAC-WEST TELECOMM, INC., PAETEC COMMUNICATIONS, INC. RCN TELECOM SERVICES, INC. AND US LEC CORP.

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The Association for Local Telecommunications Services, Cbeyond Communications, LLC, DSLnet Communications, LLC, El Paso Networks, LLC, Focal Communications Corporation, New Edge Network, Inc., PaeTec Communications, Inc., Pac-West Telecomm, Inc., RCN Telecom Services, Inc., and US LEC Corp. (together, "Commenters") submit these reply comments in the above-captioned proceeding concerning the Commission's Triennial Review of unbundled network elements ("UNEs").[1]

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[1] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Notice of Proposed Rulemaking, CC Docket No. 01-338, FCC 01-361, released December 20, 2001 ("NPRM").

I. INTRODUCTION AND SUMMARY

Since initial comments were filed in this proceeding, the D.C. Circuit in *USTA* remanded the *UNE Remand Order* and arguably vacated the line sharing rules. Commenters applaud the Commission's decision to seek rehearing of *USTA* and urge the Commission to appeal to the Supreme Court if rehearing is denied. The Commission should defer this proceeding pending resolution of rehearing and any appeals of *USTA*. Should the Commission at some point choose to proceed under the mandate of *USTA*, the Commission should nonetheless keep in mind the manifest errors of that decision. In addition to the outright conflicts with the Supreme Court in *Verizon* concerning TELRIC, *USTA* apparently reflects the further erroneous views among others that CLECs are on equal footing in competing with ILECs, that unbundling may only be required for facilities that are a natural monopoly, and that self-provisioning of UNEs is a realistic possibility. If the Commission moves forward under *USTA*, it should simply explain again why these views are wrong rather than implement any of them.

If the Commission chooses based on *USTA* or for other reasons to implement a more granular approach to unbundling, it should establish a framework which permits an opportunity to reestablish UNEs on a national basis, but that also provides for implementation of granularity by state commissions pursuant to federal standards where granularity for a UNE is appropriate. Under this approach, the Commission would use the current five part impairment test to evaluate whether to determine national impairment for a UNE, or, only a nationwide presumption of impairment. A presumption of impairment would be used to establish a burden of proof on ILECs to show to state commissions that impairment does not exist pursuant to federal standards. The Commission should prescribe guidelines for the specific granular tests to be applied by the

states. An important part of any new rules that draw back from current unbundling obligations would be a transition mechanism to new rules. The Commission should grandfather for five years individual UNEs already obtained by a CLEC. This approach is consistent with *USTA,* should the Commission decide to operate under the mandate of that decision, because the opportunity to rebut a nationwide presumption of impairment creates an adequately tailored approach to access to UNEs.

At the present time, however, and as explained further in these reply comments, there is very little reason to believe that CLECs are not impaired without unbundled access to all of the current UNEs as available under current rules. With respect to high-capacity loops and transport, the BOCs have submitted in initial comments no more than a warmed over version of their "Fact Report" provided over a year ago that contains the same errors and proves nothing. Consequently, Commenters at this time do not propose any specific granular tests for any UNEs. However, Commenters discuss herein some of the factors that would need to be considered in fashioning a more granular test. More specifically, any such test would need to be applied on a route specific basis, *i.e.* unless an ILEC can show pursuant to more detailed standards that alternatives exist on a certain route, in addition to other showings, CLECs would be impaired without unbundled access on that route. Some of these factors might be relevant to establishing impairment on a national basis for other UNEs. For example, cost of capital is not likely to vary for CLECs in different parts of the country. CLECs are impaired with respect to all UNEs uniformly due to lack of access to capital.

The Commission should reject various modifications to the current five-part impairment test proposed by ILECs. In particular, the Commission should reject the proposed test to the effect that CLECs are not impaired with respect to a UNE if any CLEC in any market is self-provisioning it. As explained herein, it is not realistic to expect CLECs to self-provision UNEs to any significant extent and the fact that some CLECs may self-provision some UNEs does not show that CLECs are not generally impaired without access to a UNE.

Additionally, since initial comments were filed in this proceeding the Supreme Court in *Verizon* has provided valuable guidance to the Commission and the industry concerning key issues in this proceeding. The Court thoroughly examined and definitively rejected the BOCs' position that provision of unbundled network elements at TELRIC inhibits their, and CLECs', incentives to construct facilities. The Commission should rely on this guidance to reject in this proceeding the BOCs' tiresome refrain that unbundling at TELRIC inhibits deployment of broadband. Rather, as explained by the Court and in these reply comments, TELRIC fully compensates ILECs for new network investment.

The Supreme Court in *Verizon* also reinstated the Commission's rules requiring ILECs to combine network elements at a CLEC's request. The Commission should use this proceeding to direct ILECs to fully comply with these rules and not permit unlawful restrictions. The Commission should reject BOC requests that the Commission apply the "significantly local" test applicable to EEL conversions to new combinations of UNEs. The EEL conversion restrictions only apply to conversions from special access, which were intended, in any event, only as temporary. Further, there is no basis to assume that IXCs would shift traffic from special access

to new combinations of UNEs because they have not done so where new EELs have been available, and in light of the operational and technical risks involved (*e.g,* disruption to customer service).

In light of the revivification of the Commission's authority to require ILECs to provide combinations of UNEs, the Commission should take this opportunity to establish a number of safeguards to assure that ILECs will discharge their obligation to provide UNEs. The Commission should determine that ILECs' "no facilities" policy is unlawful, prohibit unnecessarily cumbersome UNE ordering processes, reverse *Net 2000,* and adopt a rule that requires ILECs to provide UNEs when requested pending an ILEC petition for review before an appropriate authority if the ILEC believes for whatever reason that it is not obligated to provide the UNE.

The Commission should also reject the BOCs' by now predictable litany that parity, intermodal competition, and "broadband" warrant restricting unbundling. Although BOCs are apparently endlessly repeating these themes to anyone who will listen, this does not make them any more convincing. In a nutshell, parity in regulatory burdens is not appropriate for ILECs given their status as dominant local telephone companies subject to Title II and, in any event, is irrelevant to an impairment analysis; the extent of intermodal competition is exaggerated and is also irrelevant to an impairment analysis; and restricting unbundling would not promote broadband, but rather permit ILECs to stall on innovation and implementation of efficiencies by insulating them from intramodal competition.

Accordingly, the Commission should defer this proceeding pending rehearing and appeal of *USTA* and otherwise adopt the recommendations contained herein.

II. THIS PROCEEDING SHOULD BE DEFERRED PENDING REHEARING AND SUPREME COURT REVIEW OF *USTA*

As observed by the Commission in its recent motion for rehearing of that decision, the opinion of the D.C. Circuit in *USTA* starkly conflicts in a number of respects with the decision of Supreme Court in *Verizon*. Most obviously, the D.C. Circuit reversed the Commission on the basis of its independent and highly opinionated evaluation of fundamental policy decisions that should have been left to the Commission's expert opinion. In contrast, the Supreme Court was careful to confine its review to the standards of *Chevron*.[2] In addition, the Court in *USTA v. FCC* simply chose to defy the guidance provided by the Supreme Court on key issues. The D.C. Circuit questioned the validity of TELRIC even though the Supreme Court affirmed it. Similarly, the D.C. Circuit chose to question the Commission's judgment that TELRIC pricing does not thwart facilities-based investment by either ILECs or CLECs even though the Supreme Court expressly affirmed the Commission on this point. And, as discussed below, the D.C. Circuit seems to be of the remarkable opinion that CLECs as a general matter may have a competitive advantage over ILECs even though the Supreme Court had previously recognized that ILECs have a nearly "insurmountable" advantage over new market entrants.

In light of the manifest conflict between *USTA* and the Supreme Court, the Commission should not resolve issues in this proceeding at all, and certainly not in light of *USTA*, until

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[2] See *Verizon Communications, Inc., et al. v. FCC*, 535 U.S. ___, 122 S.Ct. 1646, 1668 (2002) ("*Verizon*"), *citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 843-845, 104 S.Ct. 2778 (1984).

rehearing and any appeals to the Supreme Court are complete. Given the high likelihood of reversal of *USTA* on appeal, deferral of this proceeding would reduce burdens on carriers and promote regulatory certainty. To the extent the Commission does nonetheless proceed to some extent under the mandate of *USTA*, it should simply reestablish the current rules. To the extent it chooses to implement granularity for any UNE it should establish a framework governing unbundling in which states implement granularity pursuant to federal standards as further described in these reply comments.

III. IN EVALUATING *USTA*, THE COMMISSION SHOULD KEEP THE FOLLOWING POINTS IN MIND

A. ILECs Are Not Victims

Of all the errors in *USTA*, perhaps the most dramatic is the view that ILECs and CLECs may be relative equals, or that ILECs may even be the underdogs in the local telecommunications marketplace, because the disadvantages CLECs face may be "fully offset by the exigencies faced by ILECs" such as regulatory "hobbling" that allegedly requires ILECs to charge above cost in markets to offset losses in subsidized markets.[3] However, the Supreme Court has found the opposite. The Supreme Court has noted that "[t]he Act, however, proceeds on the understanding that incumbent monopolists and contending competitors are unequal."[4] The Court chronicled how control over the local exchange gives ILECs a nearly insurmountable advantage:

> A local exchange is thus a transportation network for communications signals, radiating like a root system from a "central office" (or several offices for larger

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3 *United States Telecom Ass'n v. FCC*, 2002 WL 1040574, *7 ("*USTA*").

4 *Verizon* at 1653.

> areas) to individual telephones, faxes, and the like. It is easy to see why a company that owns a local exchange (what the Act calls an "incumbent local exchange carrier," 47 U.S.C. § 251(h)), would have an almost insurmountable competitive advantage not only in routing calls within the exchange, but, through its control of this local market, in the markets for terminal equipment and long-distance calling as well. A newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent's entire existing network, the most costly and difficult part of which would be laying down the "last mile" of feeder wire, the local loop, to the thousands (or millions) of terminal points in individual houses and businesses. The incumbent company could also control its local-loop plant so as to connect only with terminals it manufactured or selected, and could place conditions or fees (called "access charges") on long-distance carriers seeking to connect with its network. In an unregulated world, another telecommunications carrier would be forced to comply with these conditions, or it could never reach the customers of a local exchange.[5]

The intimation that impairments CLECs face are offset by exigencies of ILECs ignores the nearly century-long head start that the ILECs have enjoyed in deploying their networks and the substantial public funding from which the ILECs have benefited. As this Commission noted, "the incumbent LECs still enjoy cost advantages and superiority of economies of scale, scope and ubiquity as a result of their historic, government-sanctioned monopolies."[6] As the Commission went on to note:

> These economies are now critical competitive attributes and would belong unquestionably to the incumbent LECs if they had "earned" them by superior competitive skills. These advantages of economies, however, were obtained by the incumbents by virtue of their status as government-sanctioned and protected monopolies. We believe that these government-sanctioned advantages remain barriers to the requesting carriers' ability to provide a range of services to a wide

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5 *Verizon* at 1661-62.

6 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 at ¶ 86 (1999) ("*UNE Remand Order*").

> array of customers, and that their existence justifies placing a duty on the incumbent carriers to share their network facilities.[7]

ILECs were allowed to deploy their own networks at their own speed and without competition for many years with a guaranteed rate of return. As a recent study by Economics and Technology, Inc. observed, "the RBOCs and other ILECs enjoy enormous advantages stemming directly from the basic scale economies and 'first mover' advantages deriving from their *incumbency* positions in the local telecommunications market."[8] ETI found that as of December 2001, the total market capitalization of the RBOCs was $345.8 billion representing a market premium over book value of $264.4 billion. ETI noted that this premium can be "traced to the firm's acquisition of valuable business assets at less than their market value or perhaps at no cost at all."[9] After divestiture, the RBOCs were "gifted valuable assets and earnings opportunities, enabling them to generate significant additional profits far in excess of what would be permissible under the traditional 'competitive price' standard of public utility regulation."[10] RBOCs were granted "valuable public resources – electromagnetic spectrum and the use of public rights-of-way – without any payment to the government and with the right to exploit such gifted assets without any price regulation or earnings constraints." The RBOCs have "been permitted to exploit legacy monopoly relationships with customers and other legacy assets to develop and expand into new nonregulated lines of business, without any obligation to

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7 *Id.*

8 Lee L. Selwyn, *Subsidizing the Bell Monopolies: How Government Corporate Welfare Programs are Undermining Telecommunications Competition* at 3 (April 2002) ("ETI Study").

9 *Id.* at 25.

10 *Id.*

compensate the regulated portion of their operations for the fair market value of those assets."[11] The RBOCs have been "largely insulated from any serious competitive losses through a variety of funding mechanisms that have shifted preexisting sources of excess profits into fees and other charges that are imposed upon competitors."[12] These fees not only "make the RBOCs whole with respect to any actual competitive 'losses' they may sustain, but concurrently increase competitors' costs and make their entry and success all the more difficult."[13] Under price cap regulation, RBOCs "continue to earn in excess of 425% on their *interstate* services – a monopoly earnings level that could not be sustained under competitive market conditions."[14]

Thus, the "exigencies" that the RBOCs face have proven to be quite lucrative and certainly not a source of any disadvantage. CLECs meanwhile, as also explained elsewhere in these reply comments, must attempt to deploy alternative facilities in the context of competition for funds not only from the RBOCs, but other CLECs as well, with no assurance of any return on their investment. Moreover, the cost of self-provisioning the facility or purchasing the facility from another provider is only part of the costs that a CLEC faces in providing service to a customer. As the Commission has noted:

> Even if a particular element may be purchased outside of the incumbent LEC's network at reasonable prices, other factors, including the costs and delays associated with collocation arrangements, as well as additional costs and operational impediments associated with the manual processes used to interconnect certain network elements, may make it impossible as a practical,

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11 *Id.* at 27.

12 *Id.*

13 *Id.*

14 *Id.* at 5.

> economic, and operational matter for a competitor to provide services in the local market quickly and on a wide-spread basis.[15]

CLECs will also have higher costs to attract customers as compared to ILECs because CLECs must establish their own brand name and develop a reputation for service quality to overcome the ILECs' long-standing relationships with their customers.[16] The advantage ILECs enjoy in this regard has been termed a "first mover" advantage where the first market entrant will have the ability to "lock in" customers and it will be difficult for subsequent entrants to get the customers to switch their service.[17] This is particularly the case when the "first mover" owns the underlying transmission facilities and is able to leverage its control over these facilities. As the CFA noted, "the dominant players in the physical layer can readily distort the architecture of the platform to protect their market power."[18] The dominant players can use a variety of tools to create barriers to market entry such as exclusive deals, retaliation, and bundling of products.[19] The monopolist can also erect cross-platform incompatibilities or prevent rivals from achieving economies of scale.[20] Controlling access to the communications platform provides substantial market power to the owner of transmission facilities who can create a transmission bottleneck.[21]

Thus, far from enjoying any advantages in the marketplace, the CLECs are clearly substantially disadvantaged in comparison to the ILECs. For these reasons, in examining the

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15 *UNE Remand Order* at ¶ 63.

16 *Id.* at ¶ 87.

17 Comments of the Consumer Federation of America, Texas Office of Public Utility Counsel, Consumers Union, and Center for Digital Democracy in CC Docket No. 01-338 at 65 (April 5, 2002).

18 *Id.* at 41.

19 *Id.* at 41-42.

20 *Id.* at 43.

21 *Id.* at 45-46.

unbundling requirements of Section 251 in this proceeding, the Commission should proceed on the basis that ILECs possess a nearly "insurmountable" advantage over CLECs.

B. Congress Did Not Intend to Stop at Duopoly

The D.C. Circuit in *USTA* also suggests that the Commission could, or should, under the Act limit unbundling used to provide high speed Internet access service because the market for high speed Internet access service may be competitive and, therefore, the pro-competitive goals of the Act at least to this extent may have been already achieved. Thus, *USTA* found that the Commission in the *Line Sharing Order* had failed to consider whether a competitive market exists for high speed Internet access services and, if so, whether line sharing was necessary to achieve the competitive goals of the Act.

As explained elsewhere in these reply comments, there is not a fully developed competitive market for high speed Internet access service. And, even assuming that BOC contentions are correct concerning the extent of intermodal competition in high speed Internet access service provided by cable operators, this would at most prove the existence of an undesirable duopoly of providers for this service, and one, moreover, in which both providers are significantly raising prices due to lack of competitive pressure.

However, Congress had a more important goal and vision than the limited duopoly that BOCs claim has fully achieved the goals of the Act. Thus, the Supreme Court in *Verizon*, stated the intent of the 1996 Act was to "uproot" traditional monopolies, to promote "competition in the persistently monopolistic local markets, which were thought to be the root of natural monopoly in the telecommunications

industry," and to "eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises."[22] The Court cited to one of the main proponents of the Act who noted that the purpose of the Act is to break up the BOCs' networks and make them available to competitors:

> This is extraordinary in the sense of telling private industry that this is what they have to do in order to let the competitors come in and try to beat your economic brains out ....It is kind of almost a jump-start .... I will do everything I have to let you into my business, because we used to be a bottleneck; we used to be a monopoly; we used to control everything. Now, this legislation says you will not control much of anything. You will have to allow for nondiscriminatory access on an unbundled basis to the network functions and services of the Bell operating companies network that is at least equal in type, quality, and price to the access [a] Bell operating company affords to itself.[23]

Therefore, while BOCs would like the Commission to declare victory at this point, Congress intended a more far-reaching competition within the local telecommunications marketplace based on a break-up, through unbundling, of BOCs overwhelming dominance in provision of local telecommunications facilities. While some progress has been made in this regard since 1996, Commenters respectfully suggest that the Commission's work remains undone. Instead of shutting down, the Commission should continue to work towards the complete and total eradication of ILEC local service monopoly thorough unbundling and the facilities-based competition it promotes. The Commission should address *USTA*'s concerns with respect to unbundling for line sharing by stating that, in the Commission's expert opinion, Congress had a bigger goal than duopoly and that the Commission intends to get on with

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[22] *Verizon* at 1654.

[23] *Verizon* at 1661, citing 141 Cong. Rec. 15572 (1995). (Remarks of Sen. Breaux (La.) on Pub.L. 104-104 (1995)).

achieving that goal through line sharing and other pro-competitive unbundling obligations.

C. UNE-Based Competition Is Desirable and Mandated by the Act

Apparently having adopted the views expressed by the BOCs before the D.C. Circuit, and in their public relations campaign in the media and before Congress, that UNE-based competition is not "true" competition, the D.C. Circuit in *USTA* labeled UNE-based competition as "synthetic." Apart from the fact that this represents precisely the type of subjective opinion that the D.C. Circuit should not be engaging in under *Chevron*, it conflicts with the fact that Congress has established unbundled access to ILEC network elements as a valid mode of market entry. The Commission has found that the Act specifically provides for three different modes of competition: resale, UNEs, and building facilities,[24] any one of which (or combination of which) fulfills the goals of the Act. The assumption that UNE-based competition should phase out has no basis in the Act.

Moreover, the competitive checklist set forth in Section 271 establishes that the ILECs must unbundle key network elements as a continuing condition of providing inter-LATA long distance service.[25] Clearly, Congress did not view unbundling as antithetical to competition; to the contrary, the unbundling requirements in both Section 251 and Section 271 are the cornerstones of the Act's pro-competitive framework. Accordingly, neither the D.C. Circuit nor the Commission may lawfully attempt to restrict unbundling based on the highly subjective view that UNE-based competition is "synthetic."

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[24] See, e.g., *UNE Remand Order* at ¶5.

[25] 47 U.S.C. § 271(c)(2)(B).

Moreover, UNE-based competition provides many benefits to consumers and businesses. Assuming that prices for UNEs continue to be set based on pricing principles that would govern a competitive market, *i.e.* TELRIC, CLECs will be able to use UNEs to provide new and improved services, and existing services at reduced prices. As noted in Commenters' initial comments, it is ironic that CLECs have incentives to make better use of the ILECs' network elements than do the ILECs.[26] This is because ILECs prefer to retain and use outmoded technology rather than introduce efficiencies that cannibalize existing services.

Further, the advanced telecommunications capability objectives of Section 706 can be, and have been, met by means of UNE-based competition; it is not necessary for CLECs to provide their own facilities in order to provide advanced telecommunications capability.[27]

In addition, as the Commission has recognized, unbundling also is a critical means of market entry that allows CLECs to first develop a customer base which in turn makes possible additional CLEC facilities investment.[28] The marketplace evidence clearly establishes that access to UNEs does not deter, but rather promotes increased facilities investment by both CLECs and ILECs. As noted by the Supreme Court, the competitive industry has invested nearly $60 billion since passage of the 1996 Act.[29] Thus, the availability of UNEs is a necessary

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[26] Comments of ALTS *et al.* at 13.

[27] Moreover, commenters agree with AT&T that "[u]nbundling requirements *promote*, rather than retard, investment in advanced services facilities and therefore foster the deployment of those facilities and the provision of advanced services to consumers. Maintaining and strengthening unbundling requirements is therefore one of the best means to carry out the objectives of § 706. Conversely, weakening unbundling requirements would subvert those objectives." Comments of AT&T at 85.

[28] *UNE Remand Order* at ¶ 5 ("[T]he ability of requesting carriers to use unbundled network elements, including various combinations of unbundled network elements, is a necessary precondition to the subsequent deployment of self-provisioned network facilities.")

[29] *Verizon* at 1651.

precondition for facilities investment even if UNE-based competition were not desirable in its own right.

It is also worth noting that the D.C. Circuit's disparagement of UNE-based competition as "synthetic" conflicts with its other direction to the Commission to explore more deeply whether ILEC network elements may be natural monopolies or that construction of facilities would constitute wasteful duplication. These circumstances would warrant greater unbundling, rather than the reverse.

Accordingly, the Commission should not in any respect implement the view that UNE-based competition is undesirable.

D. The Supreme Court Rejected the D.C. Circuit's View Concerning Incentives for Facilities-Based Investment

The D.C. Circuit's view that Section 251(c)(3) unbundling may reduce incentives for facilities investment is in stark conflict with the policy and reasoning underlying the Supreme Court's recent *Verizon* opinion. The D.C. Circuit questioned how ILEC and CLEC investment compares with what would have occurred in the absence of the prospect of unbundling, stating that "we can expect at least some confrontation of the issue and some effort to make reasonable trade-offs."[30] In contrast, the Supreme Court in *Verizon* rejected the view that the Commission's UNE pricing rules deter facilities-based competition:

> At the end of the day, theory aside, the claim that TELRIC is unreasonable as a matter of law because it simulates but does not produce facilities-based competition founders on fact. The entrants have presented figures showing that they have invested in new facilities to the tune of $55 billion since the passage of the Act (through 2000). . . . The incumbents do not contradict these figures, but merely speculate that the investment has not been as much as it could have been under other ratemaking approaches, and they note that investment has more recently shifted to nonfacilities entry options. We, of course,

30 *USTA*, 2002 WL 1040574, *12.

> have no idea whether a different forward-looking pricing scheme would have generated even greater competitive investment than the $55 billion that the entrants claim, but it suffices to say that a regulatory scheme that can boast such substantial competitive capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities.[31]

The Supreme Court's analysis and rejection of the ILECs' disingenuous argument that the Commission's UNE pricing rules have deterred facilities-based competition is equally relevant and decisive in the context of the Commission's rules regarding the availability of UNEs at issue in this proceeding.

In light of the Supreme Court's reasoning and decision in *Verizon*, the Commission should reject the ILECs' arguments in this proceeding that unbundling at TELRIC rates will create disincentives for investment in new technologies.[32] TELRIC fully compensates ILECs for facilities investment no matter what type of facilities are deployed by the ILECs. For example, TELRIC pricing of fiber loops will include forward-looking risks and any costs associated with deploying fiber loops. There is no reason for ILECs to cease new investment under a TELRIC unbundling regime because TELRIC provides a full risk-adjusted return on facilities, and CLECs offering DSL-based services will pay the full economic cost of the upgraded loops.[33] In fact, through use of fill factors, TELRIC prices not only compensate the ILEC for the cost of the particular facility but also for spare capacity in the ILEC network.[34] Thus, unbundling actually

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[31] *Verizon* at 1675-76 (cites omitted). In *AT&T v. Iowa Util. Bd.*, the Supreme Court also upheld the Commission's refusal to impose facilities-ownership requirements on carriers seeking to lease network elements in ILEC networks, pointing out that the Act does *not* require facilities ownership, but requires ILECs to provide access to "any" requesting carrier. *AT&T v. Iowa Util. Bd.* 525 U.S. 366, 392-93 (1999).

[32] *See, e.g.,* Comments of BellSouth, at 32; Comments of Qwest, at 68; Comments of SBC, at 26; Comments of Verizon, at 32.

[33] Comments of AT&T at 72.

[34] *Local Competition Order* at ¶ 682.

reduces the risk of new investment because the ILEC will know that the CLEC, through TELRIC prices, is partially funding that investment. The forward-looking economic cost of such facilities will match the ILECs' book costs resulting in complete compensation based on TELRIC pricing.

As the Supreme Court recognized, TELRIC pricing of unbundled network elements provides ILECs with a return that reflects the risks they incur in providing wholesale facilities to their competitors.[35] While TELRIC pricing does not provide ILECs with the same monopoly rates of return they would otherwise receive, they are fairly compensated for their investment in facilities. The ILECs have provided no support for their claims that TELRIC-based rates discourages facilities-based investment by CLECs, inhibits competition and results in ILECs reluctantly investing in advanced telecommunications facilities. To the contrary, the level of facilities investment by both ILECs and CLECs since 1996 confirms that unbundling in fact has spurred new investment.

The Commission in the *UNE Remand Order* stated that "the standards and unbundling obligations that we adopt in this Order are designed to create incentives for both incumbent and competitive LECs to innovate and invest in technologies and services that will benefit consumers through increased choices of telecommunications services and lower prices."[36] The market

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[35] TELRIC pricing also provides incentives for CLECs to build their own facilities. As the Supreme Court found, TELRIC rates inherently include inefficiency by requiring cost calculations to include the existing location of incumbent's wire centers. Local-loop elements, as well as other network elements, will not be priced at their most efficient cost and configuration due to the ILEC network structure. *Verizon* at 1650-51. Since TELRIC intrinsically includes these inefficiencies when pricing network elements, competitive carriers still will have the incentive to increase efficiency and profitability by building their own networks. TELRIC does not provide network elements at or below cost; rather, the Supreme Court found that TELRIC pricing of unbundled network elements results in CLECs receiving facilities at less favorable rates than if they were to construct their own facilities. Clearly, TELRIC pricing of unbundled network elements does not act as a disincentive but instead encourages competitive carriers to invest in and deploy their own facilities so as to achieve the most efficient cost and network configuration.

[36] *Id.* at ¶ 5.

evidence reflects that UNE-based competition has brought about a great deal of investment. As stated elsewhere in these Comments, since 1997, CLECs have invested $56 billion in building their own networks.[37] Capital expenditures for CLECs in 2000 were valued at $24.9 billion compared to $33.6 billion for the RBOCs.[38] CLECs reinvest a much larger portion of their revenues back into their facilities than the RBOCs, 63.7% to 20.6% respectively.[39] Unbundling also has spurred ILEC investment. In fact, during the same period of CLEC investment, ILECs have invested over $100 billion.[40] Therefore, and for the reasons discussed above, the Commission should reject the ILEC's argument in this proceeding that unbundling creates disincentives to invest in facilities.

E. The "Essential Facilities" Doctrine "Natural Monopoly," and "Wasteful Duplication" Are Not Preconditions for Application of Unbundling Obligations

The D.C. Circuit in *USTA* faulted the Commission for finding impairment based on "cost disparities that, far from being any indication that competitive supply would be wasteful, are simply disparities faced by virtually any new entrant in any sector of the economy, no matter how competitive the sector,"[41] noting that "average unit costs are necessarily higher at the outset for any new entrant into virtually any business."[42] The D.C. Circuit found that "[a] cost disparity approach that links 'impairment' to universal characteristics [faced by start-up companies in

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37 Association for Local Telecommunications Services, *The State of Local Competition 2001* at 20 (February 2001) ("*ALTS Report*").

38 *Id.* at 21.

39 *Id.*

40 *Verizon* at 1676, fn. 33.

41 *USTA* at *10.

42 *USTA* at *11.

many industries], rather than one linked (in some degree) to natural monopoly," is inconsistent with the statute. In other words, *USTA* suggests that the Commission may not find impairment unless an ILEC facility is a natural monopoly, it would be wasteful duplication for others to build it, and/or it is an essential facility under the "essential facilities" doctrine.

This also represents a highly opinionated view concerning debatable economic issues that should have been left to the Commission's discretion. Moreover, the D.C. Circuit's view is at odds with the statute. First, Section 251(d)(2) establishes different standards for unbundling of proprietary and non-proprietary network elements. The former is required only where access is "necessary," whereas ILECs must provide access to other network elements under a lesser "impair" standard. Therefore, "impair" is not reasonably interpreted to mean that access to the network element is necessary or essential which would be the case if it were a natural monopoly.

Nor did the Supreme Court in *Iowa Util. Bd.* require the Commission to limit unbundling to circumstances in which facilities are essential or a natural monopoly. While Justice Breyer expressed the separate view that the Act did not permit the FCC to require unbundling "beyond that which is essential," no other member of the Court adopted that view.

In addition, the "competitive checklist" of Section 271 requires BOCs to provide unbundled access to a number of network elements because of benefits to competition, not based on the characteristics or not of whether the network element was a natural monopoly. Therefore, Congress ordered unbundling under Section 271 in order to promote competition regardless of whether the facility was essential.

Moreover, the Commission has already found that the legislative history and statutory language of the Act indicate that Congress did not intend to codify the essential facilities

doctrine when it enacted Section 251(d)(2).[43] As the Commission noted, Congress was eminently aware of the doctrine but despite this awareness, it did not adopt it. In fact, since the Act preserved existing antitrust laws, Section 251(d)(2) would be superfluous unless unbundling obligations were intended to extend beyond the criteria of the essential facilities doctrine.[44]

It is clear that the Act "plainly imposes on incumbent LECs a broader duty to deal with competitors than does the essential facilities doctrine."[45] In fact, while the essential facilities doctrine requires as a predicate that the monopolist misuse control of an essential facility to foreclose competition, the Act requires no such showing of misuse to require the ILEC to deal with the CLEC. Arguably, the Act has already made the determination that ILEC network elements are "essential facilities" and that CLECs must have access to these facilities.[46] The Act requires no showing of misuse of the facility, but instead merely requires that the CLEC show impairment.[47]

Accordingly, the Commission should implement unbundling based on the broader impair standard rather than based on whether the facility is essential or a natural monopoly.

F. The Need for Rate Rebalancing and Explicit Universal Service Support Is Irrelevant to Unbundling

As noted, in *USTA* the D.C. Circuit expressed concern that the Commission did not consider as part of its impairment analysis that in some markets "presumably ILECs must charge

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43 *UNE Remand Order* at ¶ 58.

44 *Id.*

45 *Id.* at ¶ 60.

46 *Id.* at ¶ 60, n. 114.

47 *Id.* at ¶ 60.

above cost (at least above average costs allocated in conventional regulatory fashion) in order to offset their losses in the subsidized markets."[48] The D.C. Circuit was concerned that the ability of CLECs to compete in these markets may completely offset other CLEC disadvantages. As noted above, ILECs possess overwhelming advantages in the local telecommunications marketplace that necessitate application of unbundling and other pro-competitive provisions of the 1996 Act if local competition will succeed. Further, the flip side of the circumstance cited by the D.C. Circuit is that ILECs charge below cost in residential and other markets, which essentially forecloses the ability of CLECs to compete in those markets. Further, because CLECs are not able to compete effectively in residential and rural markets they do not have the ability to shift costs between geographic markets and classes of customers. In fact, ILECs are able to make themselves whole by cost shifting and enjoy extraordinarily high profit levels in spite of the alleged "hobbling" cited by the D.C. Circuit. ILECs, of course, are also the primary beneficiaries of universal service programs for providing "under cost" service to residential and rural customers. BOCs and price cap ILECs are also the exclusive recipients of their own self-designed and unlawful universal service program that shifted a portion of inflated access charges to universal service funding. Therefore, there is no basis to assume that CLECs' disadvantages in some markets simply evaporate or are counterbalanced because ILECs allegedly charge above cost in those markets.

More importantly, even if CLECs enjoy a benefit in markets where ILECs allegedly price above cost, this is a pricing advantage that is totally unrelated to the issue of whether CLECs are impaired without unbundled access to network elements. Thus, retail pricing issues that may

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[48] *USTA* at *6.

arise once a UNE is obtained do not mean that the CLEC would not have been impaired without access to the UNE in the first place. Thus, the D.C. Circuit's concerns about retail pricing are simply irrelevant to the unbundling analysis.

In addition, the Commission and the states have recognized the need for rate rebalancing between rural and urban markets and between classes of customers. This is a difficult and sensitive area, however, because it portends possible rate increases for residential customers. Even if BOC retail pricing were significantly relevant to whether CLECs are impaired without unbundled access to network elements, the need for rate rebalancing would not justify putting a hold on competition.

Further, impairment under Section 251(c)(3) should never be measured based on the rate level selected by ILECs for their retail services. If above-cost pricing determines, or even significantly influences impairment, then ILECs can thwart unbundling by raising retail prices. Not only would this harm consumers but it would perversely reward ILECs for this conduct. Accordingly, the Commission should respond to the D.C. Circuit's concerns about rate rebalancing by finding that CLECs continue to be impaired without access to UNEs regardless of ILEC retail pricing levels.

G. Consideration of "Wasteful Duplication" and "Natural Monopoly" Would Nonetheless Justify Current Unbundling Rules, Particularly With Respect to "Next Generation" Network Elements

Although the D.C. Circuit inappropriately ventured into a free-wheeling economic policy debate about natural monopoly, and it erroneously implied that unbundling could only be ordered

for facilities that possess natural monopoly characteristics,[49] it is nonetheless clear that a consideration of whether a number of ILEC facilities, particularly loops and transport, are natural monopolies would warrant unbundling. As explained elsewhere in these comments, it is not practical or feasible for CLECs as a general matter to duplicate ILEC network elements. While some CLECs may be able to duplicate some portions of the network some of the time, no CLEC can duplicate all of the network elements it needs all of the time. Nor is it practically possible to adequately fashion a general rule that will accurately define the circumstances in which no CLEC will not be impaired without access to a network element.

The D.C. Circuit also noted that "[t]he classic case where competitor duplication would make no economic sense is where average costs are declining throughout the range of the relevant market," because in such cases "duplication, even by the most efficient competitors imaginable, would only lead to higher unit costs for all firms, and thus for customers. The Commission should note that the improvements and efficiencies reflected in "next generation" network elements appear to possess precisely the average declining cost characteristics that suggest they may be a natural monopoly. For example, fiber loops combined with dense wave division multiplexing ("DWDM")) make it possible for a number of providers to share the loop and for each one to provide virtually unlimited capacity to the customer. The average cost for providing a customer with a given amount of capacity is rapidly declining because of these and other technical improvements that are likely to make it economically infeasible for multiple providers to construct next generation loops.

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[49] *USTA* at *10, citing Areeda & Hovenkamp at p. 771c and 2 Alfred E. Kahn, The Economics of Regulation: Principles and Institutions 119 (1989).

H. Self-Provisioning of Most UNEs Is Not Realistic

In the world the RBOCs portray in their Comments and "UNE Fact Report," CLECs are able to seamlessly and expeditiously self-provision all network elements, other than OSS. The reality as demonstrated in the record of this proceeding is far different. Self-provisioning, which was already a difficult and daunting proposition for new market entrants, has grown more difficult with the downturn in capital markets and other obstacles to provisioning such as access to rights-of-way and inside wire, building access, and customer fear of CLEC instability.

The obstacles to self-provisioning specific UNEs is detailed elsewhere in these reply comments, but the Commission when it moves forward in this proceeding should address the more general question of whether it is realistic to expect significant self-provisioning at this stage of the competitive market. Neither the Act, nor this Commission, contemplated that full facilities-based competition would be self-effectuating. Such an approach would render the resale and unbundled network element provisions of the 1996 Act superfluous. Clearly both the drafters of the Act and this Commission expected the road to facilities-based competition would be a gradual one where CLECs could over time achieve the economies of scale and scope that the ILEC networks possess by engaging in "smart build" strategies.

1. ILEC Networks Were Built in a Monopoly Environment Through Public Funding

CLECs clearly are not able to duplicate the ubiquitous ILEC network overnight, if for no other reason, that ILECs have enjoyed a decades long head start in deploying their networks and this deployment was financed by substantial public funding. As noted above, the Commission has recognized that "the incumbent LECs still enjoy cost

advantages and superiority of economies of scale, scope and ubiquity as a result of their historic, government-sanctioned monopolies"[50] that "remain barriers to the requesting carriers' ability to provide a range of services to a wide array of customers, and that their existence justifies placing a duty on the incumbent carriers to share their network facilities."[51] Accordingly, it is not reasonable to expect that CLECs will be able to significantly duplicate in a few years in a competitive environment what it took ILECs 100 years to build with government protection, rate protection, and competitive protection.

2. The Supreme Court Recognized That Unbundling of ILEC Facilities Is Justified Given the Difficulty of Duplicating ILEC Facilities

Congress was clearly cognizant of the disadvantages CLECs faced and to rectify this disadvantage allowed CLECs to share certain facilities of the ILECs. The sharing of vital, hard-to-duplicate facilities is rooted in both the Act and principles of economic efficiency. As the Supreme Court noted, "entrants may need to share some facilities that are very expensive to duplicate (say, loop elements) in order to be able to compete in other, more sensibly duplicable elements (say, digital switches or signal-multiplexing technology)."[52] As the Court went on to add:

> competition as to "unshared" elements may, in many cases, only be possible if incumbents simultaneously share with entrants some costly-to-duplicate elements jointly necessary to provide a desired telecommunications service. Such is the reality faced by the hundreds of smaller entrants (without the resources of a large

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50 *UNE Remand Order* at ¶ 86.

51 *Id.*

52 *Verizon* at 1672, n.27.

> competitive carrier such as AT & T or WorldCom) seeking to gain toeholds in local-exchange markets, see FCC, Local Telephone Competition: Status as of June 30, 2001, p. 4, n. 13. (Feb. 27, 2002) (485 firms self-identified as competitive local- exchange carriers). Justice BREYER elsewhere recognizes that the Act "does not require the new entrant and incumbent to compete in respect to" elements, the "duplication of [which] would prove unnecessarily expensive," *post,* at 8. It is in just this way that the Act allows for an entrant that may have to lease some "unnecessarily expensive" elements in conjunction with building its own elements to provide a telecommunications service to consumers.[53]

The Court noted how the availability of costly-to-duplicate network elements at TELRIC prices could "avoid the risk of keeping more potential entrants out," while "induc[ing] them to compete in less capital-intensive facilities."[54]

In fact, Justice Breyer, who the D.C. Circuit cited extensively in the *USTA* decision, described the philosophy of unbundling as follows:

> [o]ne can understand the basic logic of "unbundling" by imagining that Congress required a sole incumbent railroad providing service between City A and City B to share certain basic facilities, say, bridges, rights-of-way, or tracks, in order to avoid wasteful duplication of those hard-to-duplicate resources while facilitating competition in the *remaining* aspects of A-to-B railroad service. Indeed, one might characterize the Act's basic purpose as seeking to bring about, without inordinate waste, greater local service competition . . . .[55]

Thus, the Commission must consider if the particular element at issue is, in the words of the Supreme Court, "unnecessarily expensive" to duplicate. Clearly this inquiry must be made from the perspective not of a large competitive carrier, but from that of a smaller entrant seeking to gain a "toehold" in the market.

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53 *Id.*

54 Petition of Federal Communications Commission for Rehearing or Rehearing *En Banc* at 9, *United States Telecom Assn. v. FCC*, Nos. 00-1012, *et al.*, and 00-1015, *et al.* (D.C. Cir. July 8, 2002) ("*FCC Petition for Rehearing*").

55 *Iowa Utilities Board*, 525 U.S. at 416-417 (Breyer, J., concurring in part/dissenting in part).

Thus, if for a particular element, the Commission finds that the costs of duplicating that element are "very expensive to duplicate" and the ILEC has already deployed that element, it makes economic sense for the CLEC to be able to lease that element on an unbundled basis as opposed to devoting precious, and increasingly scarce, capital to duplicating that element. The CLEC will make a choice as to whether to deploy a new facility or facilities to serve the customer based on the effect of such deployment on the average cost to serve the customer. If deploying the facility will lower its average cost of serving the customer it will build the facility; if it will not, the CLEC will lease the facility. If the economic cost to the new entrant dictates that the construction of its own facilities is more efficient and cost-effective, it will build the facilities. As the FCC has noted, since TELRIC is a reasonable measure of the incumbent's economic cost of providing a network element it will "encourage new entrants to make efficient decisions whether to lease or build and spur ILEC and CLEC investment."[56] Eliminating unbundling obligations, however, will mean that the CLEC in such a situation must either duplicate inefficiently the facility or not serve the customer.

As the CLEC obtains more customers, its average cost of serving customers will decrease and it will find it more efficient to deploy its own facilities.[57] As the Commission has noted, "the purchase of unbundled network elements from the incumbent should serve as a transitional strategy that will provide requesting carriers with the ability to gain a sufficient volume of business to justify economical deployment of their own facilities."[58]

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56 *FCC Petition for Rehearing* at 9.

57 *UNE Remand Order* at ¶ 79.

58 *Id.*

3. Until CLECs Develop Economies of Scale, Self-Provisioning Is Generally Infeasible

Currently the ILECs enjoy significant economies of scale not enjoyed by CLECs.[59] ILECs possess ubiquitous networks that allow them to reach every customer in their service area and provide them with economies of scale.[60] CLECs will seek to achieve these economies of scale, as this will allow them to spread the costs of equipment, construction, and marketing across as many customers as possible.[61] As the Commission has noted "where a firm faces both a fixed cost and a constant or declining variable cost, the average unit cost will fall as output increases, and the firm's cost structure is said to exhibit economies of scale."[62] Until CLECs begin to exhibit these economies of scale, however, ILECs will posses a tremendous cost advantage *vis-a-vis* CLECs. The inability to obtain an unbundled network element from an ILEC will increase a CLEC's costs by either forcing it to purchase a more expensive substitute or to self-provision the element at a higher cost because it lacks the economies of scale of the ILEC. The higher cost will reduce the funds available for the CLEC to extend and upgrade its network, and, thus, preclude its ability to achieve the economies of scale of the ILEC.[63] Thus, if the Commission ends unbundled access prematurely it will impede, if not foreclose, the ability of CLECs to achieve the very viable facilities-based competition it is seeking to promote.

It is clear that Congress clearly intended for CLECs to be able to tap into the economies of scale of the ILEC network. As this Commission noted:

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59 *Id.* at ¶ 84.

60 *Id.* at ¶ 98.

61 *Id.*

62 *Id.* at ¶ 76.

63 *Id.* at ¶ 84, n. 145.

> Indeed, Congress, in section 259 of the Act, recognized expressly the benefits that the incumbent LECs have as a result of their economies of scale and scope. Section 259 requires the Commission to ensure that incumbent LECs make their infrastructure available to qualifying carriers on terms and conditions that permit the qualifying carriers to "fully benefit from the economies of scale and scope of such [incumbent] local exchange carrier." Although section 259 of the Act is different from section 251 in that qualifying carriers obtaining infrastructure from the incumbent LEC pursuant to a section 259 agreement may not use such infrastructure to compete with the incumbent LEC in its service territory, both sections make the incumbent LECs' broad economies of scale and scope available to other carriers by requiring them to grant other carriers access to their networks.[64]

Without this ability to tap into ILEC economies of scale, CLECs may decide not to enter certain markets. As the Commission noted:

> Because competitors do not yet enjoy the same economies of scale, scope and ubiquity as the incumbent, they may be impaired if they do not have access, at least initially, to certain network elements supplied by the incumbent LEC. For example, without access to unbundled network elements, a competitive LEC may choose not to enter a particular market because the cost and delays associated with deploying its own facilities would be too high given the revenues obtainable from that market and the relative attractiveness of other potential new markets. Similarly, a competitive LEC may decline to enter a market because certain of their facilities are subject to economies of scale and scope such that the competitor would need a larger market share than it is likely to have initially. In such cases, competitors may choose to enter a certain market if they can obtain access to particular unbundled network elements on sufficiently favorable terms that such scale economies are overcome, and other potential markets no longer appear more attractive.[65]

4. The "Smart Build" Strategy Must Be Preserved

It is vital that the unbundling approach the Commission ultimately utilizes must protect this "smart build" strategy as envisioned by the Commission and implemented by CLECs. As Covad notes, several carriers that tried to build their own transport networks, *i.e.*, XO, Teligent,

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64 *Id.* at ¶ 86.

65 *Id.* at ¶ 13.

Winstar, went bankrupt doing so.[66] The Commission should not force competitors to make the Hobson's choice of either foregoing service to a customer or incurring more debt to duplicate needlessly existing ILEC facilities, particularly when those facilities have spare capacity. The fact that a CLEC needs to lease certain elements now does not mean it will always need to lease those elements. As their networks evolve, and their customer bases expand, they will achieve economies of scale, and be able to deploy the very facilities they are leasing today. In this way, the workings of the market will over time lessen the impairments CLECs face. The worst thing this Commission could do, however, is to attempt to force CLECs to flash cut to facilities deployment when such deployment is not economically viable and the capital to accomplish such facilities deployment is non-existent. This will stunt or completely stop any meaningful development of competition.

The Commission's current list of unbundled network elements is a sound reflection of those facilities that it would be hard for a CLEC to duplicate and those facilities that it would be more efficient for a CLEC to share rather than self-deploy. The Commission should decline any overtures to mandate self-provisioning of these network elements and allow the market to continue its evolutionary course to facilities-based deployment. The propriety of this approach is further supported by consideration of obstacles CLECs face in self-provisioning of specific network elements.

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[66] Comments of Covad at 71.

IV. GRANULARITY SHOULD BE IMPLEMENTED AT THE STATE LEVEL PURSUANT TO FEDERAL STANDARDS

A. State-Implemented Granularity

Assuming the Commission does anything in this proceeding other than retain the current rules, and that it chooses to implement some form of "granularity" based on *USTA* or for other reasons, the Commission should establish a framework in which granularity is implemented by state commissions pursuant to federal standards. Under this approach to establishing and defining ILECs obligations to provide UNEs, the Commission would apply the current five-part impairment test (weighing cost, timeliness, ubiquity, quality, and impact on network operations) to determine whether there is impairment, or a presumption of impairment, on a nationwide basis. For those elements for which there is impairment, the Commission would require that ILECs provide unbundled access to them on a nationwide basis. For those elements for which there is only a presumption of impairment, the Commission would establish a burden of proof that ILECs may seek to rebut before state commissions pursuant to FCC prescribed granular tests or standards for the UNE.

Under this approach, states would have considerable discretion as to how to conduct proceedings where ILECs seek to rebut a presumption of impairment. States could conduct generic proceedings or proceed on a basis more focused on specific CLEC requests. A key feature of this approach, however, is that ILECs would be required to promptly provide UNEs to which a presumption of impairment is applied regardless of any proceeding underway to rebut the presumption, subject to the outcome of the proceeding.

If the state commission finds no impairment and if the ILEC is otherwise obligated to provide the network element on some other pricing basis (such as special access), the CLEC may

continue to obtain the network element at the new price, if the CLEC does not self-provision or move to a different supplier. For example, if hypothetically the Commission were to establish a granular test for interoffice transport, and pursuant to that test, a state determines that the ILEC does not need to provide it, then the ILEC would be required to convert provision of the facility to special access pricing at the CLEC's election. If the state commission finds no impairment for a network element for which ILECs have no independent provisioning obligation, the ILEC may terminate provision of the network element only after providing CLECs with a reasonable period of time (no less than 360 days) to transition to self-provisioning or another carrier's facilities.

ILECs might be concerned that state impairment proceedings could in some cases be of lengthy duration. To address this concern, the Commission could determine that if a state does not resolve a "no impairment" claim within 180 days, the state commission may, upon its own discretion, impose retroactive liability upon any CLECs using challenged UNEs for the difference between the UNE rate and any analogous tariffed services, with such liability beginning no earlier than the 181st day.

If there were no presumption of impairment for a network element, the CLEC would bear the burden of demonstrating impairment.

Commenters believe that this approach is the best way to achieve granularity where a more granular approach to unbundling is appropriate. This would permit the FCC to discharge its obligation to set the ground rules to implement the local competition provisions of the Act, while leaving the specific implementation to the states who may be better able to assess impairment in light of local conditions where it is appropriate to do so. Commenters stress that the opportunity for ILECs to rebut a nationwide presumption of impairment in state proceedings

fully satisfies the concern of the D.C. Circuit in *USTA* that nationwide findings of impairment may be too broad. The opportunity to rebut the nationwide presumption of impairment at the local level adequately achieves a tailored approach to implementation of unbundled access to UNEs.

Further, implementation of any granular approach is likely to be fact intensive and state commissions, rather than the Commission, are best structured to conduct fact inquiries based on traditional fact-finding techniques such as evidentiary hearings. Accordingly, the Commission should adopt this approach of state implemented granularity pursuant to federal standards for those UNEs that ILECs are not required to make available on a nationwide basis as under current rules.

B. Transition Mechanism

It is fundamental that a few years of nascent competition has done little to uproot the RBOC's more than century-old monopoly. CLECs clearly are impaired for all current UNEs and will be for years. That being said, in the unlikely event the Commission believes that any changes should be made in rules governing UNE obligations, it should as a transition mechanism to new rules establish a significant period of time for CLECs to modify their business models and move traffic. In order to achieve this result, the Commission should establish a period of time during which CLECs may continue to obtain UNEs under current rules, and a further period during which CLECs may retain specific network elements they have obtained as UNEs but that ILECs would no longer be required to provide under the new rules. In order to assure that a CLEC's customers and business plans are not unduly disrupted, the Commission should determine that CLECs may order new UNEs pursuant to the current rules for a period of two

years from the date of adoption of new rules. At the end of that two-year period, CLECs would only be able to obtain UNEs under the new rules. Further, the Commission should determine that CLECs will be able to retain existing network elements obtained as UNEs under current rules, including those obtained during the aforementioned two year period, for a period of five years from the date of adoption of new rules or for whatever period is provided in the parties' interconnection agreement, whichever is longer. At the end of the five-year period, ILECs would be required to convert the facility to other pricing if the ILEC is otherwise required to offer it under applicable tariffs. ILECs would also be obligated to negotiate reasonable terms and conditions of use of the facility by the CLEC, or the CLEC could choose to give up the facility and make other plans.

This transition approach would assure that there is no undue disruption to CLECs or their customers. This approach is permissible under *USTA* and the Act because the Commission has discretion and authority under the Act to fashion appropriate transitions to new rules in order to avoid harmful effects that might otherwise accompany a flash cut to new rules. Accordingly, the Commission should adopt this transition mechanism if it adopts any rules that reduce UNEs available to CLECs.

V. THE CURRENT IMPAIRMENT TEST SHOULD BE RETAINED

A. *USTA v. FCC* Did Not Reject the Current Impairment Test

Assuming that at any point in this proceeding the Commission operates under the mandate of *USTA*, the Commission should nonetheless retain the current five-part impairment test. While the D.C. Circuit found fault with the results of the Commission's application of that test, it did not find fault with the test itself. Accordingly, the Commission should retain its five-

part impairment test for the purpose of determining impairment under Section 252(d)(2) even if the Commission chooses at any point to proceed under the mandate of *USTA*.[67]

B. The "Single Competitor" Test Should Be Rejected

Qwest, BellSouth, SBC and Verizon advocate that the Commission should, in effect, determine that unbundling of any network element is not required if a competitor is providing service in a particular market without using the UNE.[68] Thus, Verizon asserts that "if some CLECs use non-ILEC facilities to serve particular types of customers or geographic locations, then no CLEC should be considered impaired without access to the relevant UNEs – not just with respect to the specific customers or locations served by the original CLECs, but with respect to all similar customers or locations."[69] BellSouth argues that the Commission's "'material diminishment' factors . . . should only come into play in the context of determining whether UNEs should be made available in markets where no actual alternative ILEC elements have been deployed through self-provisioning or alternative procurement."[70] Qwest argues that even if CLECs have not entered each and every geographic location without access to a particular UNE, "evidence showing that they have entered a particular type of market means that they are not

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[67] See *infra* 39-46.

[68] According to BellSouth, "It is clear that a carrier's self provisioning or alternative procurement of elements outside of the ILEC network, in and of itself, proves that requesting carriers are not impaired without access to ILEC elements in those specific geographic and customer markets." Comments of BellSouth at 22-23. BellSouth goes on to argue that "[o]nly where there is no actual data to indicate the existence of CLEC self-provisioning or sufficient competitive alternatives to ILEC local telephone service offering in a geographic-specific market should the Commission undertake a 'material diminishment' analysis, and then only to determine whether alternatives can feasibly become available."

[69] Comments of Verizon at 43. Verizon argues that "[f]or market segments in which some CLECs are competing without using particular UNEs, there can be no finding that CLECs generally would be impaired without access to those particular UNEs. And, once it is shown that CLECs are competing without using particular UNEs in some market segments, then CLECs must be presumed to have the ability to compete without access to those same elements in other market segments, absent concrete evidence to the contrary - -mere speculation or conjecture is not enough." *Id* at 24-25. See also *Id.* at 42.

impaired without access to that UNE in that type of market; for example, if CLECs have self-provisioned an element in 92 of the top MSAs, there is no reason to believe that they would be impaired without access to that element in all the top 100 MSAs."[71]

The Commission should reject this view because it would essentially eliminate all unbundling obligations at this time in that some CLECs are in some cases providing service without some UNEs. As explained above, however, it is not realistic to expect that CLECs as a general matter could at this time significantly duplicate the ILEC network, or that any CLEC could self-provision all UNEs even if it is able to self-provision some.

As AT&T states, the fact that *some* CLECs have been able to self-deploy high-capacity fiber loops to large business in *some* circumstances in *some* dense urban areas, "is not remotely sufficient to establish that CLECs can generally deploy these loops. Indeed, the experience demonstrates that there are only rare and exceptional circumstances in which CLECs can install high-capacity loops because of the economies of scale that characterize these facilities and the rights-of-way, building access, and other first mover advantages that ILECs enjoy because of their monopolies."[72] As AT&T points out:

> [E]ven when conditions permit construction of a loop, the ILEC's first mover advantages also mean that it already has existing 'sunk' working loops to virtually all customers and that the ILEC can upgrade them or provide any additional facilities required to meet any customer's needs at incremental costs that are a fraction of the CLEC's costs of constructing a loop to the premises. Thus, the Commission's finding in the *UNE Remand Order* remains as valid today as in 1999:

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70 Comments of BellSouth at 26.

71 Comments of Qwest at 10-11.

72 Comments of AT&T at 23.

> that some competitive LECs, in certain instances, have found it economical to serve certain customers using their own loops suggests to us only that carriers are unimpaired in their ability to serve those particular customers. This evidence tells us nothing about the customer the competitor would like to serve but cannot. . . .[73]

In addition, as AT&T explains in its comments, and as established on the record in this proceeding and related proceedings,[74] although there are cases in which it may be theoretically possible to deploy facilities, there are many "real-world limitations" that impair CLECs' ability to do so, including the following: municipal rights-of-way issues,[75] licensing and the coordination of "street digs" which can cause serious delays impeding a CLECs ability to construct facilities; municipal fees and other onerous conditions placed on CLECs; municipality moratoria on fiber deployment (for example, California prohibited new construction as it examined CEQA issues); collocation issues which limit CLECs' ability to self-deploy transport; significant collocation costs that CLECs must incur to self-provision transport that the ILECs don't have; the fact that CLECs are unable to obtain collocation space in a timely and non-discriminatory manner; the fact that financial markets now are closed to CLECs and CLECs face much higher capital costs; the fact that business customers may be increasingly wary of purchasing telecommunications services from CLECs as a result of other CLEC bankruptcy filings; and the fact that the declining financial position of many CLECs limits the availability of third-party provisioned facilities as an alternative to ILEC facilities, just to name a few of the impediments the CLECs face when attempting to provision facilities in the real world. In

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[73] Comments of AT&T at 23, citing *UNE Remand Order* ¶ 184.

[74] *See, e.g.,* Joint Comments of Allegiance Telecom, Inc. and Focal Communications Corp.in CC Docket No. 96-98, at 5-27 (filed June 11, 2001); Comments of WorldCom in CC Docket No. 96-98, at 14-22 (filed June 11, 2001); Comments of XO Communications, Inc. in CC Docket No. 96-98, at 12-24 (filed June 11, 2001).

addition, as AT&T notes, a customer's need for prompt service often will prevent a customer from using an alternative provider, so that CLECs lose the opportunity to use their own facilities to serve the customer.[76]

Moreover, the Commission has already correctly rejected the view that "the presence of a single competitor providing service, without using the ILECs' UNEs, is dispositive evidence that a competitors' ability to provide service generally would not be impaired without access to such elements."[77] In addition, the Commission emphasized that "the Act is not calibrated to the performance of the company whose business plan allows it to rely the least on the incumbent LEC's network elements."[78] The Commission recognized in the *UNE Remand Order* that the fact that some CLECs are engaging in self-supply of network elements is *not* evidence of lack of impairment, but merely reflects that some CLECs may be able to cost-justify the self-provision of facilities, in some instances, for some customers, during particular time periods, and in particular geographic areas:

> The ability of one or more competitors to serve certain customers in a particular market is not dispositive of whether competitive LECs without unbundled access to the incumbent LEC's facilities are able to compete for other customers in the same market or for customers in other markets. In some markets, particularly those markets serving high-volume business customers, it may be practical and economical for competitive LECs to compete using self-provisioned facilities. In other markets, however, typically those markets consisting of residential consumers and small businesses, the delay and costs associated with self-provisioning a network element will preclude those same competitors,

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[75] As AT&T notes, even where rights-of-way can be obtained, negotiations take at least 4-6 months and sometimes years (citing the example of TCG which sought permission to provide service in White Plains, NY almost 10 years ago and still is unable to obtain it.) Comments of AT&T at 144.

[76] Comments of AT&T at 147.

[77] *UNE Remand Order* at ¶ 53.

[78] *Id.*

or others, from assuming the risk of entry, unless they can purchase unbundled elements from the incumbent.[79]

Accordingly, the Commission should reject the ILECs proposal to base its impairment analysis on a showing that "some" CLECs are competing using their own facilities or other alternatives.

C. ILEC Proposed Modifications to the Current Impairment Test Should Be Rejected

As an alternative to abandoning the five-part test as requested by ILECs, BOCs also suggest a number of modifications to each of the elements of the five-part test. The Commission should reject these suggestions.

1. Cost

Qwest argues that the Commission should place "less weight on alleged differences between the cost of utilizing a UNE versus the cost of obtaining facilities from non-incumbent sources than it did in the *UNE Remand Order,*" and that "[t]he mere fact that UNE prices might be lower than a CLEC's cost of obtaining an element from an alternative source does *not* establish that lack of access to that UNE would impair the CLEC's ability to provide service." Similarly, BellSouth argues that the Commission "should afford cost less weight than the other four factors."[80] Commenters disagree. The increased cost of obtaining an element from an alternative source could, depending upon the circumstances, be sufficient to establish impairment.

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[79] *Id.* at ¶54.

[80] Comments of BellSouth at 24.

Commenters agree with AT&T's analysis that there is no rational basis for affording less weight to cost than to other factors.[81] As AT&T identified in its comments, the Commission in the *UNE Remand Order* "explained the many different ways in which analysis of costs could be not only important, but critical," particularly in light of the economies of scope and scale enjoyed by the ILECs.[82] Contrary to Verizon's assertion, it is not true that the Supreme Court "flatly rejected" "a rationale for unbundling based on "presumed cost savings."[83] The Commission has recognized that this type of argument "mischaracterizes the Supreme Court's decision because that decision did not preclude consideration of cost differences, nor did it foreclose such differences from being dispositive in appropriate circumstances."[84] The Commission should therefore dismiss the assertions of Verizon and other ILECs that the Supreme Court in *Iowa Utilities Board* precluded consideration in the "impairment" analysis of costs to CLECs of obtaining alternative network elements.

Verizon argues that the Commission's impairment analysis "must take into account all the revenues a CLEC can realize from serving the customer, not just those derived from

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81 Comments of AT&T at 36-38.

82 Comments of AT&T at 37.

83 Comments of Verizon at 57, *citing Iowa Util. Bd.*, 525 US at 390. BellSouth also mischaracterizes the Supreme Court's ruling. See Comments of BellSouth at 24 (asserting that "[t]he Supreme Court made it clear that the Commission cannot, as a matter of law, conclude that impairment in profitability (which occurs whenever costs of service are incrementally raised without a corresponding increase in service revenues), means ipso facto that the CLEC is also impaired 'in its ability to provide the services it seeks to offer.'" *Id.* citing *Iowa Utils. Bd.*, 525 U.S. at 390.

84 *See* Brief of Respondent FCC, United States Telecom Assoc. v. FCC, No. 00-1015 (D.C. Cir.) (filed July 2, 2001) ("*FCC UNE Remand Brief*") at 29-30. Moreover, as AT&T notes in its comments, "Judge Williams observed at oral argument [that] the Commission's shift in the *UNE Remand Order* from relying on "any" cost difference to only "material" cost differences fully addresses this aspect of the Supreme Court's decision." Comments of AT&T at p. 38, *citing* Oral Argument Transcript at 9-10, *United States Telecom Assoc. v. FCC*, No. 00-1015 (D.C. Cir. March 7, 2002).

providing the services it 'seeks to offer' using the UNE."[85] Verizon's proposal is irrelevant to the cost analysis in relation to the "impairment" standard. The cost factor of the Commission's unbundling test properly considers the "costs a carrier incurs to substitute the alternative network element for the incumbent LEC's network element."[86] The Commission should determine that hypothetical revenues from other hypothetical services are not relevant to a determination of whether the cost of an alternative network element to substitute an ILEC network element would impair a requesting carrier's ability to provide a service. Moreover, Verizon's proposed cost factor would require speculation and would be administratively unworkable to apply, as it would require the Commission to analyze separately, for each carrier, hypothetical future revenues from "other" hypothetical services that a CLEC may or may not ever provide to customers in the future.

Similarly, the Commission should reject Verizon's assertion that "the Commission cannot take into account differences between the cost of using alternatives to UNEs and the TELRIC-based cost of using UNEs."[87] Verizon argues that:

> TELRIC is an artificial cost standard that bears no relation to the actual forward-looking costs of providing an element. . . . If impairment is found whenever the cost of provisioning alternatives is higher than the artificially low costs of operating a fictionally ideal network, there is no real "limit" on the unbundling obligation. . . . [T]he fact that differences exist between TELRIC-based rates and the rates for alternatives provided in a competitive marketplace merely confirms that the TELRIC-based rates are uneconomically low; it does not demonstrate impairment.[88]

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85 Comments of Verizon at 57.

86 *UNE Remand Order* ¶ 24.

87 Comments of Verizon at 58.

88 *Id.*

The Supreme Court in *Verizon* upheld the Commission's TELRIC pricing rules and the reasoning and policy underlying the Supreme Court's analysis in the *Verizon* case require that the Commission reject Verizon's argument on this point.

2. Timeliness

Verizon argues that "timeliness should no longer be a relevant factor in the impairment analysis,"[89] and asserts that "[t]o the extent a CLEC or third-party supplier does not yet have loop facilities to a particular end user's location (particularly for business customers), there is no reason such alternative facilities could not be deployed within six to twelve months."[90] Verizon also states that, "to the extent CLECs want to expand the scope of their current operations, they obviously can plan in advance to have their facilities in place in a timely manner, just as other businesses must do."[91] Verizon also says that "many delays faced by CLECs (such as those associated with the permitting or construction process) are identical to those faced by ILECs, once again precluding any finding of competitive impairment."[92]

Verizon fails to acknowledge market realities and the fact that Verizon and the other ILECs control the local loop bottleneck, and enjoy rights-of-way, building access and other first mover advantages as a result of their monopolies. Verizon appears to argue that CLECs (and/or third party suppliers) should be able to replicate the ILECs' local loop infrastructure throughout the country in "six to twelve months," so that timeliness should no longer be a factor in the Commission's impairment analysis. As the Commission stated in the *UNE Remand Order*, it

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89 *Id.* at 58-59.

90 *Id.*

91 *Id.* at 59.

92 *Id.*

considered timeliness in its impairment analysis to determine "whether self-provisioning or purchasing a network element from a third-party supplier would prevent a requesting carrier from entering the market within a reasonable time, or from expanding its operations to meet promptly the demand of its customers."[93] Timeliness remains a critical factor in the Commission's unbundling test. Even if CLECs or third party suppliers could replicate ILEC ubiquitous network elements such as local loop facilities in six to twelve months, which in itself is a ridiculous proposition, this still would prevent the requesting carrier from entering the market within a reasonable time or from expanding its operations to meet customer expectations.[94] Verizon's argument is absurd and the Commission should dismiss it accordingly.

3. Quality Differences

Verizon claims that "there is no basis for concluding that network elements from non-ILEC sources are of lower quality than ILEC UNEs,"[95] and asserts that in any event, "the Court has warned that mere differences in quality do not amount to impairment."[96] Commenters submit that quality continues to be an important factor in determining impairment. Moreover, Verizon has once again mischaracterized the Supreme Court's decision in *Iowa Utilities Board*.[97] As discussed above,[98] the Supreme Court only ruled that the Commission cannot assume that *any* (italicized emphasis was used by the Court in the *Iowa Utilities Board* decision) decrease in

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93 *UNE Remand Order* ¶ 24.

94 Moreover, as emphasized by Mpower, it is "crucial to understand that it generally is not and cannot be economical to replicate the 'last mile' to the customer premises." Comments of Mpower at 3. "Not only is such replication very expensive and time-consuming but it is unnecessary, disruptive and highly inefficient." *Id.* at 6.

95 Comments of Verizon at 59.

96 *Id.*, citing *Iowa Util Bd.*, 525 US at 389.

97 See *supra* at 40.

98 See *supra* 40, n. 85.

quality would cause access to that element to "impair" the entrant's ability to provide the proposed services. Instead, it is an issue of degree and materiality, which the Commission addressed in fashioning its unbundling test on remand. The Supreme Court did *not* rule that a difference in quality standing alone would not be sufficient to show impairment.

4. Ubiquity

Verizon states in its comments that the Commission has "overemphasized the importance of ubiquitous alternative elements" by failing to consider (1) that "most CLECs are interested in serving medium and large businesses, and thus do not need non-ILEC facilities to every home or small business in order to provide service," and (2) "that alternative facilities do not currently exist in particular locations does not, standing alone, demonstrate impairment."[99] Verizon concludes that "[a]ccordingly, the FCC cannot, consistent with the statute, presume that CLECs are impaired just because alternative facilities have not yet been deployed in a particular market; nor can it mandate global access to a UNE even if it finds impairment in particular markets or market segments."[100]

Commenters reiterate that ubiquity is and remains an extremely important factor in the unbundling analysis. As the Commission has recognized, "[i]n some cases, to compete effectively with the incumbent LEC for the same customers, competitive LECs must be able to attain similar economies of scale that can only be achieved by serving a broad base of customers within a geographic area."[101] Verizon's comments on this issue completely ignore the critical importance of economies of scope and scale. The Section 251 unbundling requirements are a

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99 Comments of Verizon at 59-60.

100 *Id.* at 61.

101 *UNE Remand Order* ¶ 25.

fundamental and critical component of the statutory framework set forth in the 1996 Act to promote the development of competitive markets, particularly in light of the ILECs' traditional monopoly stranglehold and the huge competitive advantage that the ILECs have in their capacity as monopoly providers.

As noted above, the Commission in its *Local Competition Order* noted that ILECs have "economies of density, connectivity, and scale" and required that these economies be shared with new entrants.[102] Accordingly, the Commission found that efficient competition for local exchange services will be promoted by allowing new entrants "to enter local markets by obtaining use of the incumbent LECs' facilities at prices that reflect the incumbents' economies of scale and scope."[103] The Commission emphasized in the *UNE Remand Order* that "one important purpose of the unbundling provisions of the Act is to permit competitive LECs to compete with the same economies as the incumbents, especially in the early stages of local competition, when their networks are limited in their reach, and their customer bases are necessarily small."[104] The Commission recognized that the advantages of these economies were not "earned" by the ILECs, but rather were "obtained by the incumbents by virtue of their status as government-sanctioned and protected monopolies."[105]

The Commission has reiterated that these "government-sanctioned advantages remain barriers to the requesting carriers' ability to provide a range of services to a wide array of customers, and that their existence justifies placing a duty on the incumbent carriers to share

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[102] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499, ¶ 11 (1996) ("*Local Competition Order*").

[103] *Local Competition Order* at ¶ 232.

[104] *UNE Remand Order* at ¶ 86.

their network facilities."[106] To further this end, the Commission must ensure that requesting carriers have access to UNEs as required by Section 251, and must ensure that requesting carriers have access to the same technologies and economies of scale and scope that are available to the ILECs. Thus, contrary to Verizon's unfounded assertions, ubiquity remains a critical factor in the unbundling analysis.

In addition, Verizon's assertion that CLECs are "not interested" in providing service to residential or small customers artfully ignores the fact that CLECs currently have very little economically viable opportunity to compete for these types of customers due to under cost ILEC rates under state universal service regimes. The existence of imbalanced rate structures resulting in under cost ILEC rates for residential, rural and small business customers make it all the more critical that ubiquity remain a factor in determining national UNEs and presumptive UNEs, and that UNEs remain available for the development of competition in these markets.

5. Operational or Technical Impediments

Verizon makes the broad statement in favor of eliminating network operations considerations in the Commission's unbundling analysis, that, "[g]iven the great success that CLECs have had using both their own network elements and alternative facilities from a wide variety of non-ILEC suppliers, the use of non-ILEC facilities does not compromise a CLEC's network operations."[107] Commenters submit that operational or technical impediments are a critical factor that the Commission must continue to consider in its impairment analysis. Moreover, as evidenced by the numerous recent bankruptcy filings by CLECs and other potential

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105 *Id.*

106 *Id.*

107 Comments of Verizon at 61.

non-ILEC suppliers, the few alternative facilities from non-ILEC suppliers that may have existed previously are becoming more and more scarce, which in turn increasingly calls into question the operational and technical reliability of such potential alternatives.

D. The Commission May Not Restrict Unbundling In Order to Promote Broadband

The ILECs propose to elevate goals of facilities investment and broadband deployment above all other objectives of the 1996 Act. As noted in Commenters' initial comments and as succinctly stated by Sprint, "[t]he Act's unbundling obligations make no exception for advanced services, and the Commission need not revisit that issue."[108] Accordingly, the Commission may not weaken the "impair test," or deny unbundling in order to promote broadband goals, which, in any event, the Commission has totally failed to identify or define. Further, as discussed in Commenters' initial comments, the only reasonable interpretation of the Act as a whole is that Congress intended the goals of Section 706 to be fully compatible with, and achieved by, a comprehensive implementation of unbundling obligations.[109]

Further as discussed herein,[110] reducing ILEC unbundling obligations would retard facilities competition and stymie the benefits that result from competition, including innovation and lower prices.

Qwest argues that the Commission should separately consider in its unbundling analysis, in addition to impairment, the effect on incentives to invest, and cites the *UNE Remand Order*

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108 Sprint comments at 10.

109 ALTS *et al* comments at 27-31.

110 See *supra* at 18-19.

for this proposition.[111] However, the very language in the *UNE Remand Order* that Qwest cites confirms that the Commission took investment incentive issues into account in establishing the Commission's unbundling test: "[T]he unbundling rules we adopt in this proceeding seek to promote the development of facilities-based competition."[112] Setting aside the administrative impracticality and the hypothetical and speculative nature of the type of inquiry proposed by Qwest, there is no need to modify the Commission's unbundling test as Qwest requests to separately analyze "investment incentives." The unbundling test established in the *UNE Remand Order* encourages investment in facilities, as illustrated by the large investments made by CLECs and ILECs since the issuance of the *UNE Remand Order*.[113] Moreover, the Commission has on three occasions determined that "advanced telecommunications capability" is being provided on a reasonable and timely basis.[114] It would be arbitrary for the Commission to conclude that reducing unbundling obligations is necessary to encourage investment or that this would achieve the goals of Section 706.

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111 Comments of Qwest at 14, citing *UNE Remand Order* at ¶ 7.

112 *UNE Remand Order* at ¶ 7.

113 See *infra* at 137.

114 See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Third Report, CC Docket No. 98-146, FCC 02-33 (rel. Feb. 6, 2002) ¶ 1 ("Third Report on Advanced Services"); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 15 FCC Rcd 20,913, 20,914, T 1 (2000) ("Second Report on Advanced Services"); and *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd 2398, 2405, 116 (1999) ("First Report on Advanced Services").

VI. IMPAIRMENT ANALYSIS FOR SPECIFIC NETWORK ELEMENTS

A. Standard Loops

1. ILECs Maintain Their Bottleneck Control Over Last Mile Facilities

Incredibly, the RBOCs contend that "with respect to POTS (or mass market) loops, substantial competitive pressures indicated that at least in some targeted geographic areas CLECs are not impaired without access to the local loop."[115] This pronouncement of lack of impairment by the RBOCs flies in the face of recent Commission findings on the state of competition in regard to loops. The Commission, not even two years ago, noted "competitors often are totally dependent on incumbent LECs for last mile wireline access to end users."[116]

The RBOCs claim there is intermodal competition from cable telephony and wireless services, and also intramodal competition from CLECs deploying their own loops.[117] Based on this purported competition, Verizon recommends that the Commission should (i) eliminate unbundling obligations for loops where both cable telephony and digital CMRS service is available; (ii) presume that CLECs are not impaired in their ability to provision loops to multiple dwelling units ("MDUs") without access to unbundled loops; (iii) decline to mandate unbundling of loops used to serve new developments; and (iv) require CLECs to produce concrete evidence demonstrating the circumstances, if any in which they are impaired in their ability to serve

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115 Comments of BellSouth at 66; *see also,* Comments of Verizon at 123-129; Comments of SBC at 102-103.

116 *Application of GTE Corporation, Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License,* CC Docket No. 98-184, Memorandum Opinion and Order, FCC 00-221, ¶ 181 (June 16, 2000).

117 Comments of Verizon at 123-126.

business customers without access to ILEC loops.[118] Finally, Verizon proposes the remaining unbundling requirements for these loops should sunset no later than three years after the effective date of the Commission's order in this proceeding.[119]

2. Intermodal Competition, Even if Significant, Does not Justify Eliminating Unbundling

First, even assuming *arguendo* the existence of intermodal competition, such competition is irrelevant to the impairment analysis the Commission must conduct. Section 251(d)(2)(B) of the Act requires the Commission to consider whether the "failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the service that it seeks to offer."[120] CLECs are not seeking to provide cable telephony or wireless service. CLECs are seeking to provide wireline service. CLECs do not own cable plant or wireless networks, and there is no indication that they can lease cable plant or wireless networks to provide their telephony service. As Covad notes, it cannot use cable, wireless or satellite facilities to replace DS-1 loops because the facilities are not available to be leased by requesting carriers.[121]

It is not simply sufficient that there is an alternative provider to the address in question. Unless a CLEC is able to lease capacity from that provider to provide service to the location, the alternative is no alternative at all. Clearly under the language of Section 251(d)(2)(B), lack of access to the loop network element would "impair the ability of the telecommunications carrier

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118 *Id.* at 128.

119 *Id.* at 129.

120 47 U.S.C. § 251(d)(2)(B).

121 Comments of Covad at 49.

seeking access to provide the services it seeks to offer."[122] The presence of cable plant to that location would not lessen the impairment of the CLEC unless a CLEC could lease that facility at TELRIC, or TELRIC equivalent rates which is not the case. Cable operators will not lease their plant under any terms to CLECs. Therefore, the existence of intermodal loop services is totally irrelevant to whether CLECs are impaired without access to ILEC loops.

Second, apart from the fact that intermodal competition is irrelevant to an impairment analysis, the RBOCs have failed to establish that cable telephony or wireless telephony are currently significant marketplace phenomena. The RBOCs focus on the availability of cable telephony not on how many customers actually use cable telephony as their primary source of local telephony. Thus, while cable telephony is available in 10 million homes (10% of all homes), only 1.5 million homes currently subscribe to cable telephony service.[123] Cable telephony possesses only a 1.3% market share.[124] It is projected that by 2006, the market share will still only be 6%.[125]

It is also unclear whether these homes use cable telephony as their primary residential line. For instance, given the fact that cable telephony will not work when commercial power fails unless the cable company makes back up power provisions, it is unlikely that many customers will rely on cable telephony as their primary telecommunications option.[126] The

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122 47 U.S.C. § 251(d)(2)(B).

123 *2002 UNE Fact Report* at IV-10.

124 Meg McGinity and Jonathan Blum, *Is Cable Telephony a Credible Threat? Nah.*, The Net Economy (May 6, 2002). A copy of the article can be found at: http://www.theneteconomy.com/article/0,3658,apn=2&s=907&a=26520&ap=1,00.asp

125 *Id.*

126 *Id.*

RBOCs have also failed to demonstrate that cable telephony will be a competitive alternative for business customers. Cable service is not generally available to businesses.[127] Even if cable facilities did provide access to small business customers, the limitations on upstream bandwidth found with cable would limit the services that could be provided to small business customers.[128] Also cable modem service in the past has not been suitable for transmitting voice services, and as the shared cable network becomes more congested, voice services because they are sensitive to delay, may become more subject to further degradation in quality.[129]

Moreover, to receive cable telephony customers will have to subscribe either to basic cable or to Internet service, which would price the product out of the reach of some consumers, and not support the universal service goals of this Commission. Therefore, even if it had any relevance to impairment, there is no reason to believe that cable telephony is having any significant market impact.

Finally, eliminating unbundling obligations on the basis of the presence of cable telephony would simply create a duopoly. A customer would only have a choice between the ILEC and the cable company. As the Commission noted:

> We also disagree with the incumbent LECs' argument that cable television service offers a viable alternative to the incumbent's unbundled loop. Cable service is largely restricted to residential subscribers, and generally supports only one-way service, not the two-way communications telephony requires. Moreover, we conclude that declining to unbundle loops in areas where cable telephony is available would be inconsistent with the Act's goal of encouraging entry by multiple providers. Given that neither mobile nor fixed wireless can yet replace

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127 CC Docket No. 01-338, Joint Declaration of Anajli Joseph, Eric Moyer, Mark Richman, and Michael Zulevic on Behalf of Covad Communications Company at ¶ 15 (Apr. 5, 2002) ("*Covad Declaration*").

128 *Id.* at ¶ 16.

129 *Id.* at ¶ 18.

> wireline service, if we were to take the incumbents' approach, consumers might be left to a choose between only the cable company and the incumbent LEC.[130]

The RBOCs have provided no reason for the Commission to deviate from this finding.

In regard to wireless services, at most, the RBOCs have established that wireless service is an alternative for second line service.[131] By the RBOCs' own admission, only 3% of wireless subscribers use their wireless phones as their primary line.[132] It is telling that Sprint, whose Sprint PCS division is a thriving wireless carrier, does not consider wireless services to offer an alternative to the ILEC loop. Sprint notes that the great majority of consumers still maintain their wireline services.[133] Sprint also notes that it has scaled back or delayed investment in fixed wireless technologies.[134] In short, cable and wireless services are still ancillary to wireline service and do not provide an alternative to the unbundled loop. Moreover, the Commission clearly recognized the worth of multiple entry strategies and to deny access to the unbundled loop would foreclose competitive provisioning of wireline services.

3. CLECs Are Not Overbuilding Loop Facilities

If there is a paradigmatic, hard to duplicate "essential" facility it would have to be the loop. In fact, the Commission has noted that the loop is "an element that is widely agreed to have natural monopoly characteristics."[135] The instances of self provisioning of loops are

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130 *UNE Remand Order* at ¶ 189.

131 *See 2002 UNE Fact Report* at IV-12.

132 *Id.* at IV-13.

133 Comments of Sprint at 24.

134 *Id.* at 25.

135 *FCC Petition for Rehearing* at 12.

miniscule particularly in comparison to the staggering amount of loops in the ILECs' ubiquitous network. As Sprint notes, only 3% of the nation's lines are served by CLECs on their own last mile facilities.[136] Despite this fact, the RBOCs contend that CLECs are overbuilding loop facilities in certain areas. The RBOCs can only proffer three discrete areas where this overbuild is taking place. One is by CLEC affiliates of ILECs that pursue an "edge-out strategy" in areas "geographically proximate to their existing ILEC holdings."[137] This is a far cry from a CLEC deploying its own loop network, however. Since the build-out is geographically proximate to their networks, the CLEC affiliate of the ILEC can tap into the efficiencies of scale and scope of its ubiquitous ILEC network. For instance, it can connect the loop facilities back to their existing transport network. The RBOCs note that these CLECs are able to "leverage the excess capacity on [its] existing plant to reduce startup and entry costs."[138] Not every CLEC can do that, however, and the vast majority cannot. These CLECs will continue to remain impaired without access to the unbundled loop. Even for those CLECs that are affiliates of the ILEC, the same cost and timeliness consideration of overbuilding loop facilities will still apply.

Another instance of purported overbuilding is the deployment of "broadband" pipe to "provision high-speed bundled service offerings to individual neighborhoods or the approximately 30-35% of the population that live in multi-dwelling units."[139] This is more clearly an instance of use of high-capacity loops, and the huge costs of deploying these high-capacity facilities are discussed further below.

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136 Comments of Sprint at 21.

137 *2002 UNE Fact Report* at IV-15.

138 *Id.*

The third area of purported overbuild is new housing developments. The RBOCs only cite to two instances of CLECs winning bids to serve a particular development and expects the Commission to carve out an unbundling exception based on this limited data. One of the new developments is being served by a CLEC affiliate of an ILEC, thus, as noted above, this particular CLEC will have advantages in being able to deploy new loop facilities that other CLECs would not have.

Even if one takes the RBOCs' evidence at face value, it only demonstrates a sliver of CLEC provisioned loops in the ILEC-dominated network landscape. The fact that only a limited number of CLEC loops have been deployed and many of those deployed are from CLEC affiliates of ILECs shows that CLECs have a long way to go before self-provisioning of loops becomes a viable option.

Given the language of the Supreme Court on hard-to-duplicate facilities, which the D.C. Circuit cited favorably, the Commission may continue application of a national rule in regard to unbundled loops. It is clear that competitive deployment has not evolved to a stage that impairment in regard to these facilities has been lessened. Furthermore, it would be wasteful and economically inefficient to require CLECs to self-deploy these facilities.

B. Subloops

It appears that there is no opposition to the continued unbundling of the subloop. As Sprint notes, as CLECs build out more loop plant, the subloop will become more vital and

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[139] *Id.*

provide much needed flexibility for the CLEC.[140] Sprint notes from its experience as an ILEC, the unbundling of the subloop has not been burdensome or increased it costs.[141] Thus, the Commission should continue to designate subloops as a UNE.

C. Line Sharing

In *USTA*, the D.C. Circuit found that the Commission in the *Line Sharing Order* had failed to consider whether a competitive market exists for high speed Internet access services and, if so, whether line sharing was necessary to achieve the competitive goals of the Act. As explained above, however, even if there were significant intermodal competition for high speed Internet access service this would mean, at most, that there is currently an undesirable duopoly. Because Congress did not intend duopoly to be the end point of competition, there is no basis for the Commission to conclude that line sharing is no longer necessary because the pro-competitive goals of the Act have already been met.

Moreover, as explained in Commenters' initial comments, no changes have occurred since the *Line Sharing Order* with respect to the material inefficiency, lack of ubiquity, and cost of CLECs' purchasing alternatives to the high frequency portion of the loop. Indeed, there are no such alternatives available. Accordingly, the Commission should conclude that CLECs remain impaired without access to line sharing and reinstate that requirement.

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140 Comments of Sprint at 30.

141 *Id.*

D. High-Capacity Transport And Loop Facilities

1. Dedicated Transport

The ILECs have once again rolled out statistics that purportedly demonstrate that there is a thriving competitive market for high-capacity loop and transport facilities and that unbundling obligations for such facilities should either be eliminated or significantly curtailed. Examining the 2002 Fact Report, one would think all the goals of the 1996 Act have been achieved in six short years, and that the Commission can close the door on implementation of that Act. The "facts" of the UNE Fact Report are belied by the realities of the market where many competitive providers have entered bankruptcy, including many of the competitive providers of fiber that the ILECs use to buttress their arguments as to the availability of alternative facilities. The fact that the ILECs continue to make these claims, the specifics of which will be rebutted below, in the face of the depressed competitive market demonstrates the flimsy and transparent nature of their arguments.

Even assuming *arguendo* the ILEC "facts," if the Commission were to eliminate or limit unbundling obligations for dedicated transport on the premise that there are competitive transport alternatives to some locations and between some points, the Commission would essentially freeze competition at current levels. The truth of the matter is that the few competitive carriers that deploy alternate transport facilities do not do so between ILEC central offices, but rather build rings of fiber between a few (on an average of six) buildings per city. Generally these buildings are collocation hotels, POPS and high-rise office buildings. The dedicated transport that is a UNE is between ILEC central offices. While some carriers bring facilities to one or two

ILEC central offices, CLECs do not have the ubiquitous choice for transport between ILEC central offices by any other carrier.[142]

Given current CLEC financial situations and closed capital markets, the likelihood of competitive fiber routes increasing and being deployed to connect all of the ILEC central offices is extremely remote. Dedicated transport is very important between ILEC central offices because without it, a CLEC would need to collocate in each and every ILEC central office to gain access to loop facilities to customers. Thus, without unbundled access to dedicated transport, CLECs would be unable to expand their networks to serve new customers or central offices. What is worse, restricting access to unbundled dedicated transport may imperil the very facilities-based competition that has already developed. One commenter provided a telling example. For example, suppose a CLEC operates in an area with five central offices and that the CLEC has facilities deployed to connect its network to two of the central offices, but for the other three it uses unbundled dedicated transport ("UDT") because its traffic in those central offices does not support the deployment of facilities. If the UDT routes are removed, the CLEC will be unable to connect all five central offices, and its ability to operate in that service area will be imperiled.[143]

This, in a nutshell, is why even if the Commission finds the ILEC facts to be true, which they are not, the Commission must still continue to require UDT. Abandoning UDT at this point would either freeze competition, or imperil it further, with the latter scenario being more likely.

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142 *See* Attachment 1 to these reply comments, Declaration of Richard Batelaan, Vice President – Operations, Cbeyond Communications, LLC. This declaration explains, *inter alia*, that only ILEC networks provide ubiquitous coverage, leaving the ILEC the only provider. It also explains that CLECs lack adequate alternatives to ILEC unbundled DS-1 loops, and that ILEC high capacity facilities are not a separate network.

143 Comments of AT&T Corporation at 136-137.

The Act, as interpreted and applied by the Commission, envisioned competitive networks being deployed over a number of years. Six years is too short a time frame, and has proven to be too short a time frame, for this deployment. CLECs are still impaired, and will continue to be impaired, without access to unbundled dedicated transport. For this reason, the Commission must continue to require unbundled dedicated transport.

(a) There Are No Alternatives to the Ubiquitous ILEC Network

i. The RBOCs Perpetuate The Same Distortions In Data

In its initial comments, Commenters noted that contrary to ILEC statements as to the availability of fiber, such fiber, to the extent it exists, is limited to inter-city long haul networks and did not encompass the vast majority of intracity, interoffice routes.[144] The RBOCs once again propound statistics as to the amount of route miles.[145] The RBOCs, however, rely on the same source of data for fiber route miles that are in *the High-Cap Proceeding*, and once again misapply the data. Specifically they cite to the *NPRG CLEC Report 2002,* which does not provide a breakdown between local and long-haul fiber. In fact, the RBOCs admit that many CLECs do not publicly disclose how many purely local route miles of fiber they operate.[146] Thus, when RBOCs state that the majority of the 184,000 fiber route miles deployed are local, this is based on their interpretation of public disclosures made by CLECs as to what type of fiber they deploy.[147] Tellingly, the RBOCs do not proffer a figure for local fiber. Also, RBOCs do not demonstrate that the fiber route miles cited by them is the amount of fiber actually deployed

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144 Comments of ALTS *et al.* at 64-65.

145 UNE Fact Report at III-6.

146 *Id.*

147 *Id* at n. 27.

as opposed to planned deployment, which given the current state of capital markets will mean that the fiber will not be deployed in the near future, if at all. SBC contends that in the past three years, the number of CLEC fiber networks has increased from 1,100 to nearly 1,800.[148] This number is rendered all the more surprising considering that the number of operational CLECs has plunged from 300 to 150.[149]

At any rate, even if these figures are taken at face value, ILEC networks dwarf the networks of CLECs.[150] For instance, AT&T, one of the largest CLECs, has deployed only 17,000 route miles of local fiber compared to 362,000 route miles of ILEC fiber.[151] For the vast majority of its routes, AT&T must rely on ILEC facilities.[152] This is the case for other CLECs.[153] For example, Cbeyond states it does not have an alternative to BellSouth for high-capacity loops.[154] The same is true for Penn Telecom in the Verizon region, and CTC Exchange in its region.[155] Focal notes that while it has a policy of using competitive sources of fiber it has found that it usually has no alternative but to purchase from the ILEC.[156]

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148 Comments of SBC Communications, Inc. in CC Docket No. 01-338 at 85 (Apr. 5, 2002).

149 Comments of WorldCom in CC Docket No. 01-338 at 21 (April 4, 2002).

150 Comments of WorldCom at 15.

151 Comments of AT&T Corporation in CC Docket No. 01-338 at 150 (April 4, 2002).

152 Comments of AT&T at 151.

153 *Id.*, citing comments of Advanced Telecom Group, Allegiance, Cbeyond, El Paso, Focal, McLeod, NuVox, Penn Telecom and WorldCom in High-Capacity proceeding.

154 *Id.*

155 *Id.* at 151-152.

156 Comments of ALTS *et al.* at 50.

ii. CLECs Need UDT To Connect ILEC Central Offices

CLECs can only self-deploy facilities to a fraction of ILEC central offices. WorldCom, with a large fiber network, can only provide transport to a small fraction of the approximately 22,000 ILEC wire centers.[157] Moreover, existing competitive fiber networks only reach a small percentage of ILEC wire centers.[158] Competitive access providers generally do not focus on connecting ILEC central offices together.[159] In the areas in which Sprint operates, it finds that only 28% of central offices are accessible by CLEC-provided transport and many of these alternative sources of transport are CLECs that are in bankruptcy or financially unstable.[160] AT&T has noted that many of its customers are wary of it using non-ILEC sources of transport for fear of the financial viability of competitive sources of transport.[161]

Covad analyzed alternative transport available to it in four key markets: Chicago, New York City, San Francisco, and Washington, D.C. About half the time, the only transport available to Covad was from the ILEC.[162] Without UDT, Covad would have its traffic stranded in nearly 50% of its collocation sites.[163] Covad is currently collocated in 1700 ILEC central offices and would like one day to expand to compete with the ILECs' 3200 central office footprint, but since the other 1500 central offices are in more remote areas where there will be

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157 Comments of WorldCom at 77.

158 *Id.*

159 Comments of Covad at 66.

160 Comments of Sprint at 46.

161 Comments of AT&T at 46.

162 Comments of Covad at 67.

163 *Id.* at 67.

fewer, if any, competitive sources of transport, Covad's path to facilities-based expansion would be precluded by a lack of unbundled transport.

SBC and BellSouth contend that CLECs do not need to replicate the ILEC transport network.[164] SBC contends that by focusing on discrete wire centers, "a CLEC can readily reach all or virtually all of the customers that it seeks to serve."[165] Similarly, BellSouth states that CLECs can focus on discrete wire centers.[166] Essentially the RBOCs are advocating that CLECs limit themselves to certain wire centers and not seek to expand their competitive presence. The real losers in this equation are customers without sufficient traffic, or in underserved wire centers, that will never see the hope of competitive service. The whole idea of UDT was to expand the number of wire centers competitors could serve. BellSouth suggests that a "patchwork of transport offerings" for CLECs will not lead to a material degradation of quality.[167] CLECs cannot cobble together a "patchwork" of transport offerings as in the vast majority of central offices there are no alternatives to ILEC transport facilities.

iii. The RBOCs Overstate Alternative Sources of Fiber

The RBOCs suggest that a multitude of utilities are now deploying large amounts of fiber.[168] It appears that the RBOCs have not updated the UNE Fact Report to reflect new 2002 realities. For instance, it still states that El Paso has plans to spend $2 billion to deploy a

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164 Comments of SBC at 93; Comments of BellSouth at 94.

165 Comments of SBC at 93.

166 Comments of BellSouth at 94.

167 *Id.* at 97.

168 Comments of BellSouth at 93; Comments of SBC at 86.

nationwide fiber network.[169] El Paso has since scaled back its network deployment plans significantly and plans to focus on the Texas market.[170]

The RBOCs also trumpet the presence of collocation hotels.[171] For instance, Verizon contends that CLECs can obtain access to competitive transport merely by collocating in one of these collocation hotels.[172] As with the presence of fiber-based collocators in an ILEC central office, the presence of collocation hotels does nothing to indicate that there are alternative sources of fiber on a particular route. Unless the number of collocation hotels mirrors the thousands of wire centers, the ubiquity of the ILEC networks will not be matched. Even in major metropolitan cities such as Houston, Texas, there are only a handful of collocation hotels with a limited number of carriers that can transport to on an average only six other locations in the city. And unless the area served by the collocation hotel has sufficient demand to justify the deployment of alternative facilities the same obstacles to self-deployment of transport will remain.

Even if CLECs are able to duplicate small portions of the ILEC ubiquitous network, it cannot replicate the physical diversity that ILECs have. For instance, ILECs often have multiple fiber routes to serve customers so that if there is a problem on one route the customer will not lose service. Since CLECs have a long way to go in deploying the initial routes, deploying

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169 2002 UNE Fact Report at III-13.

170 *Comments of ALTS et al.* at 55, n. 156.

171 Comments of Verizon at 107; Comments of BellSouth at 95.

172 Comments of Verizon at 107.

diverse routes is even more remote. Yet this is part of acceptable service quality that customers demand.[173]

Commenters also noted how the state of the special access market demonstrates ILEC dominance in transport facilities. ILECs' control of the market and their ability to charge excessive, above-cost prices demonstrate their dominance.[174] In fact, after obtaining pricing flexibility for special access services in certain areas, none of the ILECs have reduced their special access rates, and some have, in fact, increased their rates.[175] ILEC special access rates are now nearly twice the economic costs.[176] Verizon suggests that the large difference between UNE transport rates and ILEC special access rates are due to the UNE rates being arbitrarily low and special access rates being competitively disciplined.[177] Clearly there is no competitive discipline to special access rates if ILECs have raised the rates soon after they were given pricing flexibility. Moreover, one SBC sales representative in a recent arbitration made the remarkable admission that he has not once in 12 years faced a situation in which SBC faced competition in seeking to provide broadband special access services.[178] Pricing flexibility was designed to allow ILECs to respond to marketplace realities. The marketplace reality seems to be that the ILEC can charge any price it wants. If the transport market were as competitive as the ILECs make it out to be ILECs would not be able to exercise such pricing power. In fact, the market

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173 Comments of AT&T at 144.

174 *Comments of ALTS et al.* at 66-67.

175 Comments of AT&T at 140.

176 *Id.* at 157.

177 Comments of Verizon at 111.

178 "I have not done any competitive bids to my knowledge." Petition of El Paso Networks, LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company, Texas Public Utilities Commission, Docket 25188, Deposition of Dwayne Cunningham at 104 (April 18, 2002).

statistics bear this out as CLECs have only captured 12% of the special access market.[179] Verizon incredibly contends that CLECs have captured 1/3 of the special access market.[180] As AT&T notes, this figure has been shown to be incorrect,[181] and is patently unbelievable given the ability of ILECs to charge such high prices. In addition, the premium prices for ILEC special access services make them a less-than-satisfactory alternative than UNE interoffice transport for CLECs.

Commenters also noted that ILEC statistics as to the presence of fiber-based collocators does nothing to demonstrate that alternative fiber facilities are available.[182] Even with the presence of a competitive fiber provider ("CFP") in a central office, CLECs still encounter much difficulty in getting access to the CFP.[183] The RBOCs, however, continue to trumpet the presence of a fiber-based collocator as proof of surrogate transport facilities,[184] even though they also deny CFPs reasonable access to the central office.[185] The existence of a single "fiber-based collocator" in those central offices does nothing to show the availability of that fiber to other CLECs or of other alternatives in the remaining ILEC central offices. For some CLECs, the ILEC is the only source of these loop and transport facilities in the markets in which they

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179 Comments of AT&T at 125.

180 Comments of Verizon at 105.

181 Comments of AT&T at 154.

182 *Comments of ALTS et al.* at 68-69.

183 *Id.* at 69. Such is the case with SBC who at every turn of the tap put artificial barriers between collocators and alternative providers. SBC has just recently arbitrated its obligation to provide cross connects between collocators in the same central office, wanting the collocators to "self provision" cabling between cages by augmenting the collocation arrangement, installing conduit and running cabling. This work takes unnecessary time and money when the cross connect panels exist in the central office already. This is a typical example of the ILEC stating to the FCC that competitive alternatives exist, but at a grassroots level thwarting competition at every turn.

184 Comments of SBC at 86; Comments of BellSouth at 91; Comments of Verizon at 106.

operate.[186] Further, even in the rare instances where CLECs have access to another collocated CLEC's spare fiber, it often takes the ILEC months to make the connection necessary for the CLEC to use such alternative fiber.[187]

(b) CLECs Are Limited In Their Ability to Self-Provision Transport Facilities

In their initial Comments in this proceeding, Commenters demonstrated the high cost of extending CLEC networks to additional central offices.[188] WorldCom noted that to add a central office to its network would cost over $1 million, and would be substantially more if the central office is located several miles from its existing network, which is often the case.[189] WorldCom has customers that utilize DS-1 or higher bandwidth in 6800 ILEC wire centers. For a CLEC to extend its network to so many wire centers would take years. The CLEC would also have to collocate in all those central offices, which imposes a separate very significant cost. Given the closed capital markets, if the Commission denied access to UDT, customers served in thousands of wire centers would lose competitive alternatives.

As noted above, the ILECs possess a tremendous advantage in economies of scale and scope. Since ILECs already have substantial demand, and have in-place facilities, ILECs can serve these customers at a much lower cost than a CLEC that would have to self-deploy

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185 *Petition for Declaratory Ruling of Coalition of Competitive Fiber Providers*, CC Docket No. 01-77, filed March 15, 2001 ("*Fiber Coalition Petition*").

186 Comments of Broadslate/Network Plus/RCN/Telergy High Cap at 26.

187 *Id.*

188 Comments of ALTS *et al.* at 70.

189 Comments of WorldCom at 77.

facilities.[190] In addition, since ILECs already have a substantial amount of fiber facilities in place, they can add capacity simply by adding electronics to the fiber. Thus, their incremental costs are much lower than the CLEC who would have to deploy new fiber and then the electronics to serve additional customers.[191] The costs of deploying new fiber facilities are approximately $200,000-$300,000 per mile in densely populated areas not including the cost of electronics. On top of that the CLEC must factor in collocation costs that will range from $15,000 to $500,000.[192] These are all up-front costs incurred before customers are served. This funding may have been achievable in the heyday of the capital markets for telecom, but now the markets are virtually closed.[193] Thus, network expansion opportunities will be very limited. BellSouth suggests that metropolitan fiber suppliers are still obtaining capital.[194] Even if this were the case in early 2001 which is the time frame of the capital disbursements to which BellSouth refers, it is undeniable that the capital markets have closed to wholesale fiber providers in 2002. As the Commission has noted, "a large cost disparity (whether indicative of a natural monopoly or not) might be probative of impairment . . . ."[195]

Deploying facilities, therefore, is only viable where the CLEC has sufficient customer demand to justify this fiscal outlay, and capital to support the expansion. Even then the demand will be only sufficient if traffic is aggregated from several offices to one central location from which it can deploy the fiber. Thus, the CLEC will still need ILEC IOF to reach the central

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190 Comments of AT&T at 128.

191 *Id.* at 130.

192 *Id.* at 126.

193 Comments of WorldCom at 21; Comments of AT&T at 141.

194 Comments of BellSouth at 63.

195 *FCC Petition for Rehearing* at 13.

location.[196] CLECs use UDT to fill in vital transport gaps where it does not have sufficient traffic to justify the deployment of facilities.[197] Many CLECs are using a variation of the ILEC hub and spoke approach where they self-provision facilities from certain hubs, but they still need ILEC transport to connect the spokes to the hub.[198]

AT&T currently purchases special access circuits to 11,500 ILEC central offices. For 70% of these offices, AT&T has insufficient traffic to fill a single DS-3 facility to reasonable levels of utilization.[199] And since AT&T is a carrier with a significant amount of long distance traffic, other CLECs with lesser amounts of traffic would find it even more infeasible. AT&T noted that even with its amount of traffic the only way it can economically deploy fiber is if it aggregates its traffic from several central offices to a central location from which it can deploy fiber.[200] Even when CLECs deploy a fiber ring they still need ILEC facilities to get the traffic from the customers' premises to the serving wire center and then interoffice transport to get to hubs where the ring is located.[201]

The time to deploy facilities is also a significant issue as the delays referenced in the high-capacity loop section apply in the transport section and are exacerbated since transport routes traverse numerous jurisdictions.[202] The ILECs contend that CLECs are able to obtain

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196 Comments of AT&T at 131.

197 *Id.* at 137.

198 *Id.*

199 *Id.* at 135.

200 *Id.* at 136.

201 *Id.* at 149.

202 Comments of ALTS *et al.* at 70.

municipal rights-of-way access as easily as ILECs do. SBC states that obtaining a municipal permit only takes a few months, and to the extent some municipalities take longer, this affects all carriers not just CLECs.[203] First, the ILECs already have a substantial amount of fiber, including dark fiber, in place, so municipal rights-of-way is not as much an issue for them.[204] CLECs, on the other hand, have to go to the municipalities and obtain the access.[205] Thus an ILEC can quickly extend service to a new customer while the CLEC, if it has to lay new fiber, will take months to be able to offer the same service. CLECs have documented the difficulties they have faced in getting such access including exorbitant fees, onerous conditions, and perks to the municipality.[206] Many communities have placed moratoria on new fiber deployment so paying those fees may be a luxury.[207] In some major areas, ROW and conduit exhaustion are major problems. For instance, Sprint had to wait two years to pull fiber through the Lincoln Tunnel.[208] And, even if ILECs did not enjoy a significant time advantage, CLECs would nonetheless be impaired under the statutory standard because of the numerous difficulties associated with obtaining municipal authorizations to construct.

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203 Comments of SBC at 94.

204 Comments of AT&T at 142.

205 Verizon admits some municipalities have onerous franchise approval processes, but that there is no competitive impairment because ILECs and CLECs are equally affected. Comments of Verizon at 111. This is not the case, however, as ILECs have already gone through the process and deployed their fiber. CLECs are impaired in the sense that to offer service to customers in new areas they have to clear this onerous process while the ILEC can deploy service in a few days.

206 Comments of AT&T at 143.

207 *Id.*

208 Sprint Comments at 23.

As noted earlier, the ILECs have had the luxury of deploying their networks over the course of many years and having that network funded by a captive rate base.[209] Moreover, their investments were protected under rate of return regulation and price cap regulation such that even when they made imprudent investment they were often able to recoup the cost. As a result, the ILECs have been able to deploy 220 million local loops and a transport network of 362,000 miles of fiber.[210] Meanwhile, CLECs have had to compete for available capital, which is becoming more scarce, and have had to build up a customer base from scratch. To expect CLECs to self-deploy their own networks and compete on an equal footing with ILECs within a mere six years is too much. The presence of alternative competitive facilities demonstrates that CLECs will deploy facilities when it is prudent to do so. [211] The Commission should allow CLECs to continue this smart build strategy.

The marketplace realities of the past two years show how difficult it is for CLECs to deploy alternatives to the ubiquitous ILEC transport network. This ILEC ubiquitous transport network would be very expensive to duplicate and has ample spare capacity. It makes no economic sense for CLECs to devote precious and scare capital to duplicating this network. Such capital would be better served in finding innovative technologies to fuel different services that would be transported over these transmission facilities or to deploy facilities in areas where self-provisioning would be more cost effective for the CLEC.

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209 Comments of AT&T at 123.

210 *Id.*

211 Id. at 124.

(c) The Commission Should Not Predicate the Availability of UDT on the Basis of ILEC Suggested "Triggers"

The RBOCs propose various limitations for UDT. SBC states that the Commission should not unbundle DS-3 facilities and above including dark fiber.[212] SBC also contends that ILECs should not be required to unbundle DS-1 facilities at wire centers with (1) two or more fiber based collocators, (2) with at least 15,000 business lines, (3) that generate $150,000 or more in access revenues.[213]

As demonstrated above, there is no basis for any of these restrictions. SBC contends that CLECs do not purchase unbundled DS-3 loops so they would not be impaired without access to those facilities.[214] This is false. El Paso now purchases DS-3 loop UNEs on a regular basis. Still, SBC has worked diligently to defeat El Paso's efforts to order these DS-3 loop UNEs, and still improperly denies access. While most business customers do not generate such a high level of demand, some do.[215] While Qwest reports that over half of the buildings with DS-1 or above service are only served by a single DS-1,[216] ILECs provide DS-3 loops to many thousands of locations where there is no alternative provider that could be served by CLECs with DS-3 UNE loops.[217] For CLECs to be able to serve those customers, they will need unbundled access to those facilities. Otherwise the market for customers served by these facilities will remain the exclusive province of ILECs.

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212 Comments of SBC at 88.

213 *Id.*

214 *Id.*

215 Comments of WorldCom at 19.

216 *Id.*

217 *Id.* at 76.

In addition, now that the ILECs' obligation to combine UNEs has been made clear, CLECs will have the opportunity to order loops, aggregate the traffic by utilizing ILEC multiplexing and order higher bandwidth and more efficient and economical transport back to one or two collocation sites in a market area. This new ability will increase the need for dedicated transport and encourage CLECs to deploy networks in second and third tier cites where it was previously economically infeasible to collocate in every central office to obtain market share. The ability to obtain new combinations of network elements opens up new opportunities for CLECs to meet the needs of businesses and consumers, but only if dedicated transport is available.

As CLEC networks evolve, and increase the amount of traffic served over those networks, CLECs will need more dedicated transport at DS-3 levels and above to transfer this traffic to their hubs. As the capacity of the facility increases, the unit cost of providing traffic over these facilities reduces. Thus, ILECs will be able to provide services at lower cost in comparison to the CLEC. In any event, ILECs should continue to provide dedicated transport at the DS-1 level to CLECs, and requiring ILECs to provide DS-3 or OC-n facilities would not be any more burdensome to the ILECs, in fact it is actually more efficient when such bandwidth is needed by a CLEC to provision at the higher level rather than at the DS-1 level. It is simply a matter of adding electronics to the fiber which the ILEC routinely does for its own retail services and for special access services.

For DS-1 facilities, there is no basis for the triggers that SBC proposes. As indicated previously, none of these triggers are any reflection of lack of CLEC impairment. The presence of fiber-based collocators is no indication that that fiber is available to other CLECs or of the

availability of other alternative transport facilities. Moreover, ILECs do not permit CFPs that would like to provide transport service to CLECs, to extend fiber into ILEC central offices on reasonable terms and conditions.[218] Likewise, the number of business lines or amount of special access revenues does not demonstrate a lack of impairment. ILECs dominate the frame relay, ATM and special access services markets. The fact that wire centers may support such a level of traffic or business does not mean that CLECs have made competitive inroads in the market or that CLECs would not be impaired without access to transport facilities in those markets.

Qwest suggests that an ILEC should not be required to provide UDT in a market in which the Commission has found that it has met the criteria for attaining pricing flexibility.[219] The Commission explicitly, and unequivocally, has rejected such an approach noting:

> It is not appropriate to use these types of triggers to determine whether alternative sources of network elements are actually available as a practical, economic, and operational matter. As we explain above, the ability of one competitor to serve certain customers in a particular market is not indicative of whether, without unbundled access to the incumbent LEC's facilities, competitive LECs could provide service to other customers in the same market or to customers in other markets. While the triggers we adopted in the *Pricing Flexibility Order* allow us to determine when an incumbent LEC can re-price its services to respond to competition, they do not allow us to evaluate whether the incumbent LEC can withhold access to the inputs that requesting carriers need to provide competitive services in the first place. In order to undertake this evaluation, we must consider the cost, timeliness, quality, ubiquity and operational characteristics of alternative elements. As we explain above, discerning the practical, economic, and operational viability of these alternatives is technical, complex, and subject to considerable uncertainty. Based on the record before us, we do not believe that we can develop reliable triggers based on objectively measurable criteria to make this determination. In particular, the administrative difficulty associated with developing triggers that capture the cost, timeliness, quality, ubiquity, and operational factors of alternatives in every wire center throughout an incumbent LEC's service territory requires us to reject such an approach. Indeed, the

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218 See *Fiber Coalition Petition.*

219 Comments of Qwest at 32.

> Commission chose precisely to adopt triggers in the *Pricing Flexibility Order*, because we found that they were administratively easy to apply. Conversely, it would not be administratively easy to apply triggers to determine which network elements the incumbent LECs must unbundle. Moreover, the use of triggers also does not allow us to evaluate whether the unbundling obligations we adopt are consistent with the goals of the Act, as the Supreme Court has required us to do.[220]

SBC's proposed tests, based as they are on proposed triggers, likewise is subject to this same shortcoming. In fact, both SBC and Qwest's approaches while relying more on a wire center approach are still too abstract in that they focus on wire center statistics instead of examining the actual state of impairment. For instance, the presence of other collocated CLECs does nothing to demonstrate whether a CLEC has adequate transport alternatives in that wire center.

As Covad notes, the collocated CLEC may have no capacity whatsoever. Second, the existence of a collocated CLEC does not mean it offers transport connected to other central offices. The CLEC's transport offerings may originate in the central office, but may terminate in an office building or other off-site facility that will be of no use to the CLEC seeking transport.[221] The CLEC would then need to find a source of transport from that location to the central office to which the CLEC needs its traffic transported. Moreover, many competitive providers of fiber offer the fiber at nominal discounts from the ILEC special access rate. Since the ILEC special access rate is in many cases more than three times the cost of unbundled dedicated transport, the competitive fiber is often not a comparable alternative.[222] Thus, any granular impairment analysis for transport must do more than look superficially at a wire center

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220 *UNE Remand Order* at ¶ 132.

221 Covad Comments at 68.

222 *Id.* at 70.

and see that there are other collocated carriers, but instead examine whether there are alternative sources of transport for the specific route the CLEC is seeking.

In fact, a route-specific analysis of transport will show that there are no competitive alternatives for the vast majority of routes for which a CLEC needs transport. Covad provided an example of its operations in the Baltimore/Washington area. Covad is collocated in over 110 central offices in the area. It has placed ATM switches in three central offices. Thus, it needs to transport traffic from the other central offices to the three central offices with the ATM switches. As Covad notes, "the remarkable network of interoffice transport connecting all of those 110+ Verizon central offices together is provided by only one entity: Verizon itself."[223]

Verizon proposes that CLECs be required to identify all routes where there is a non-ILEC alternative and explain why they require dedicated transport on that route and could not either self-supply transport or lease the fiber from a wholesaler.[224] While Verizon is correct to focus on specific routes as opposed to relying on triggers, its proposal inappropriately places the burden on CLECs in regard to demonstrating alternative routes. The record of this proceeding clearly demonstrates the availability of competitive fiber is the exception and not the norm. CLECs have demonstrated that for the vast majority of routes there are no competitive alternatives and it would be cost prohibitive to self-provision transport. Thus, to require CLECs to go through on a route-by-route basis and establish a lack of an alternative to ILEC transport would be superfluous and excessively burdensome. Second, the ILECs are in possession of the information as to

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223 *Id.* at 69.

224 Comments of Verizon at 109.

which providers offer transport out of their wire centers. Therefore, the burden should be on the ILECs to demonstrate any route-specific non-impairment for transport.

(d) The Commission Should Maintain the Definition of UDT

SBC contends that the Commission should modify the definition of UDT to limit it to transport between ILEC wire centers or switches owned by ILECs.[225] The fact of the matter is that SBC has some wire centers that do not have switches but are served by remote switches at other locations. The requirement that a switch be present flies in the face of how SBC has provisioned its network, especially in low density areas. As demonstrated above, however, the impairment CLECs face in this regard is not limited to routes between ILEC facilities. The ubiquity of the ILEC network extends not only to facilities connecting points in its network, but to facilities connecting ILEC wire centers or switches to third parties such as IXC points of presence. Without access to this transport on an unbundled basis, ILECs will maintain their tremendous advantage in regard to connectivity in their service areas.

For instance, the Commission observed that "the competitive transport facilities that currently exist do not interconnect all of an incumbent LEC's central offices and all interexchange carrier's points of presence within an MSA, or a substantial portion thereof."[226] Thus, the Commission has been clearly cognizant of the fact that the impairment extends beyond the ILEC network. The Commission has not limited its impairment analysis to those transport alternatives between ILEC wire centers. For example, the Commission noted the variety of needs that UDT would meet:

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225 Comments of SBC at 95.

226 *UNE Remand Order* at ¶ 333.

> The competitive alternatives that are available along limited point-to-point routes do not necessarily allow competitive LECs to connect their collocation arrangements or switching nodes according to the needs of their individual network designs. These carriers also require dedicated transport to deliver traffic from their own traffic aggregation points to the incumbent LEC's network for purposes of interconnection. Without access to the incumbent's ubiquitous transport facilities, competitive LECs are faced with the delays and costs of deploying their own transport facilities to meet the demand. Alternatively, competitive LEC's must utilize a patchwork of competitive alternatives, where available, to collect and route traffic to the required destination.[227]

It is not enough that a CLEC is able to get its traffic to a particular ILEC wire center. A CLEC also needs to be able to get its traffic to its own traffic aggregation point. Without such capability, the CLEC will never be able to compete against the breadth and scope of the ILEC transport network or provide service to its customers.

SBC contends that the Commission should find a lack of impairment as to entrance facilities. SBC, however, has failed to provide any indication that the impairment CLECs face in regard to transport facilities does not extend to entrance facilities. As the Commission noted in the *UNE Remand Order*:

> The record does not indicate, however, the extent to which these facilities are available to other requesting carriers or whether the location of these facilities serve the transport needs of requesting carriers seeking to provide service to particular locations. In particular, the incumbents' data does not indicate the locations at which competitive entrance facilities terminate, or whether the facilities connect incumbent LEC serving wire centers to all or substantially all of the interexchange carrier points of presence. Accordingly, we cannot conclude, based on the record before us, that the competitive entrance facility market is providing requesting carriers with effective alternatives to unbundled transport for all, or substantially all of the routes requesting carriers would need in order to provide the services they seek to offer.[228]

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227 *Id.* at ¶ 346.

228 *Id.* at ¶ 348.

SBC has not provided any such data to support removal of unbundling obligations in regard to entrance facilities and so its request should be denied.

SBC also suggests that unbundled access to entrance facilities circumvents the Commission's holding that ILECs are not required "to construct new transport facilities to meet specific competitive LEC point-to-point demand requirements for facilities that the incumbent LEC has not deployed for its own use."[229] SBC then goes on to admit that it has deployed these very facilities, but "not for its own use" but pursuant to special access or special construction requests. Thus, by its own admission, there is no construction of "new" transport facilities as these are existing facilities. And while SBC contends this construction was not for its own use, it is likely that SBC made good use of the significant, if not exorbitant, special access or special construction prices it would have charged for the entrance facilities.

Three years ago, the Commission conducted a very granular analysis and determined that CLECs would be impaired without access to unbundled dedicated transport. In reaching this conclusion, it rejected the very same arguments that the RBOCs rehash in this proceeding. The only change in the past three years has been the closing of capital markets, and the market exit of many of the sources of competitive fiber that the RBOCs trumpet. Thus, three years later, there is even more of a need for unbundling of dedicated transport facilities.

(e) Principles of Granularity for Transport

In the event the Commission does decide to adopt a more granular approach for transport than what it has already undertaken, it should do so under the state implemented approach

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[229] Comments of SBC at 96.

detailed herein and keep the following principles in mind in fashioning an appropriate test to be applied by state commissions. First as noted above, an appropriate granular approach would not be based on a particular geographic area or class of customers. Instead, a threshold requirement of any such approach would be to focus on whether (1) there are alternatives for the particular point-to-point route in question, (2) whether the alternatives provide the particular transmission capacity the CLEC is seeking, and (3) whether such alternatives are wholesale priced. If not, the alternative is not comparable, and a CLEC would undoubtedly incur significant extra costs in obtaining the transport it needs. Prior to lifting any UDT obligations, any restrictions placed on use of UNEs, such as commingling restrictions would need to be removed. Commingling restrictions would exacerbate the disparity CLECs face because ILECs are able to transport all their traffic over their ubiquitous facilities while CLECs would be forced to fend for multiple alternative facilities for transport of their traffic. The Commission would also need to implement appropriate special access performance measures and penalties to ensure that CLECs will be able to use those facilities on routes in which it has no other alternative. Without adequate performance measures and penalties, ILECs could leverage their control over special access facilities to deny CLECs a mode of transport.

Before determining that self-provisioning is a viable alternative for CLECs, the Commission must determine that there is actually capital available for CLECs to finance the deployment of these facilities and what the CLEC cost of capital would be. Only then can the Commission adequately compare the costs of self-provisioning versus unbundling. In addition, the Commission must determine if the actual end user demand justifies the build out of new facilities and whether this demand can be sustained for a sufficiently long period for a CLEC to

recover its costs. The Commission must determine if CLECs are able to obtain access to rights-of-way in a timely and inexpensive manner. The Commission must also analyze what time period CLECs will need to transition their traffic to their own networks.

In analyzing whether there are alternative facilities available to CLECs, the Commission needs to examine whether transmission capacity is in fact available to CLECs for leasing on these routes, and at what price. The Commission should also examine how many alternative providers there actually are and whether they are financially stable. The Commission should assure that CFPs have adequate access to central offices as part of any test for removing transport as a UNE. The Commission must determine if there are sufficient alternative providers to ensure long-term supply of IOF at TELRIC-comparable prices and whether the supply is sufficiently scalable such that it would support large scale purchases. Since CLECs will need varying levels of capacity, the Commission should ensure that there are alternative sources of transport at lower capacity levels (such as DS-1) as well.

The Commission will need to ensure that the quality of the transport will not be diminished. To that end, the continuing role of ILECs needs to be examined. The Commission must determine if ILECs will provide technical support, cross connects at cost-based rates, and whether they will groom sufficient numbers of circuits in needed volumes. The Commission needs to determine if third party through testing is available. The Commission will need to consider if the alternative suppliers offer a reasonably sized footprint such that the "patchwork of providers" scenario can be avoided.

This list of issues is by no means exhaustive and many more will undoubtedly arise. The issues involved demonstrate the gargantuan task involved in lifting UDT obligations. These factors will need to be considered, however, in fashioning any granular test for lifting any UDT. If these issues are not addressed, CLEC impairment in regard to transport will only continue to increase.

(f) ILEC Attempts to Limit Access to Dedicated Transport by Charging Improper Entrance Facility Rates Must be Rejected

In addition to the other ILEC attempts to limit and restrict CLEC access to dedicated transport addressed herein, Comenters are concerned that a recent policy implemented by Verizon in New York (which may be implemented or attempted in other states, as well) will further impair CLECs from obtaining access to dedicated transport.

Verizon's New York affiliate recently added a new Entrance Facilities rate element for dedicated transport that it has not previously included in the UNE rates charged to CLECs, and which was not the subject of any substantive review by the New York Public Service Commission to determine the propriety of the rate. Instead, Verizon New York filed a compliance tariff on February 19, 2002, following the conclusion of Commission UNE rate Case 98-C-1357, which included a new Entrance Facilities rate element in addition to the fixed and per mile monthly charges that had previously comprised the dedicated transport rate.[230]

Verizon's inclusion of the new rate element was contested by AT&T and WorldCom in April 5, 2002, comments filed on the compliance filing. Those parties explained that the

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[230] The new rate element, which actually consists of two components, a fixed monthly charge and a per ¼ mile monthly charge, would effectively double the rates previously charged to CLECs.

Entrance Facilities rate element was entirely new, that no corresponding provisions existed in the currently effective tariff, and that neither the Commission nor the presiding Administrative Law Judge had conducted a substantive review of the issue in Case 98-C-1357. On April 24, 2002, however, Verizon issued an industry letter that notified CLECs of the rate restructuring.[231] Verizon stated that recurring unbundled dedicated transport charges previously consisted of two rate elements – a fixed monthly charge and a per mile monthly charge. Verizon claimed that Case 98-C-1357 authorized it to impose the new, additional Entrance Facility charge, and stated that the new charge would be assessed retroactively as of March 1, 2002. At the time Verizon New York introduced the new rate element, the New York Public Service Commission had already concluded its review of Verizon New York's UNE rates, and Verizon New York had agreed to additional rate decreases as part of its Section 271 application before this Commission.

Although application of Verizon's April 24, 2002 industry letter was limited to New York, Commenters are concerned that Verizon intends to similarly impose an unwarranted Entrance Facilities rate element in other states. Any such new Entrance Facilities rate element would significantly increase the cost of dedicated transport and would thus impair CLECs' ability to obtain the UNEs necessary to provide their intended services.

Accordingly, the Commission in this proceeding should determine that this rate structure for interoffice transport is unlawful absent substantive review by the state commission.

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231 *See* April 24, 2002 Letter from Georgene Horton at Verizon to Joseph Kahl at RCN, attached hereto as Attachment 2. As Verizon explained in Attachment 2, because the cost of EEL arrangements is based on the individual loop and transport rate elements that comprise the EEL arrangements, Verizon's new rate structure will also increase CLEC's EEL costs.

2. High-Capacity Loops

(a) CLECs Continue to be Impaired In Regard to High-Capacity Loops

In the RBOC worldview, it appears that in a mere three years the monopoly over last-mile fiber facilities that ILECs have held almost since the very first fiber was deployed has suddenly been eliminated. For instance, SBC suggests that in the past three years, CLECs have significantly expanded their local fiber networks.[232] The RBOCs devote much time to chronicling the relative ease with which CLECs can add commercial buildings to their networks, obtain municipal rights-of-way, and penetrate not only urban but suburban and rural markets as well.

The marketplace reality is much different. In fact, far from witnessing the end of the ILEC monopoly over last mile high-capacity loop facilities, the last three years has demonstrated how intractable the ILEC monopoly is. CLECs have invested millions in their networks and still have only been able to make a small dent in the ILEC's monopoly over last mile facilities. According to the Commission, CLECs have been only able to deploy 272,384 high-speed wireline loops out of 193 million total loops nationwide.[233] CLECs have found that the overbuilding of ILEC loop networks is a very expensive and time-consuming proposition. In the vast majority of cases, CLECs still have to rely on ILEC last mile facilities to provide competitive service.

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[232] Comments of SBC at 98.

[233] *Trends in Telephone Service*, Industry Analysis and Technology Division, Wireline Competition, Bureau, Federal Communications Commission, May 2000.

(b) Alternative Sources of High-Capacity Loops Are Limited

Contrary to RBOC assertions, the availability and ubiquity of competitive high-capacity loop facilities has not increased, much less dramatically increased. The purported dramatic increase in competitive facilities is mere smoke and mirrors on the part of the RBOCs. For instance, SBC contends that CLECs have increased their fiber route miles to 184,000 route miles, the majority of which are local route miles.[234] As noted above, the statement about local route miles is mere conjecture on the part of the RBOCs and they have not provided a breakdown of how many miles are actual local route miles, and how many miles are long-haul miles or local transport miles.

The purported increase in CLEC fiber networks is also counter-intuitive given the number of bankruptcies in the last year, particularly for competitive fiber providers. For instance, Metromedia Fiber Networks, one of the largest CFPs, declared bankruptcy on May 20th.[235] MFN was at the top of the RBOCs' 2002 *UNE Fact Report* Table that purportedly demonstrated the construction of metropolitan fiber local networks.[236] The RBOC figures about the state of competition fail to add up. For instance, SBC contends that CLECs serve 13 to 20 million business lines, but have obtained only about 1.5 million stand-alone unbundled loops to serve business customers. SBC, thus, argues that CLECs are using alternative facilities to serve 85 to 95% of their lines. As noted earlier, however, CLECs have only captured 15% of the special access market. Clearly if alternative loop facilities were prevalent, the competitive share

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234 Comments of SBC at 98.

235 Communications Daily, Vol. 22, No. 98 at 7 (May 20, 2002).

236 *2002 UNE Fact Report* at III-12.

of the special access market would be much more extensive. Given the bankruptcy of wholesale fiber providers such as MFN, Yipes and Telergy,[237] it is unlikely that the CFPs are the source of these alternative facilities. More likely than not, the source of the alternative high-capacity loop facilities is ILEC special access services.

Verizon appears to recognize this point by suggesting special access channel terminations can be considered an alternative source and that its availability "precludes a generalized claim of impairment regarding high-capacity loops."[238] The Commission already rejected this argument raised in regard to dedicated transport in the *UNE Remand Order* noting:

> US West maintains that it need not unbundle local transport because requesting carriers can purchase its tariffed special access services. In light of the little weight we assign to the availability of resold services in our analysis, we reject US West's argument. This argument would foreclose competitive LECs from taking advantage of the distinct opportunity Congress gave them, through section 251(c)(3), to use unbundled network elements.[239]

There is no reason for the Commission to change its position on the issue. At any rate, special access services are not a suitable alternative given the high price for such facilities, poor ILEC provisioning of the facilities, and exorbitant termination liability penalties attached to the services. The primary reason CLECs have relied on these services extensively is because of the problems they have encountered in obtaining high-capacity UNE facilities.[240]

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237 Comments of ALTS *et al.* at 55.

238 Comments of Verizon at 119.

239 *UNE Remand Order* at ¶ 67.

240 Comments of ALTS *et al.* at 66.

The Commission must scrutinize RBOC statistics and determine how many high-capacity loops are actually being provisioned or leased by competitors and how many are actually being leased from ILECs as special access services. Since the RBOCs have failed to establish that CLECs are provisioning their own loops in significant quantities, or that there are ample alternative sources of loops, it is likely that the only alternative to UNE high-capacity loops are ILEC special access services. The fact that some end users may generate sufficient traffic to justify the purchase of these facilities as special access facilities does not mean that this is an economically desirable result. In a competitive market, the cost of the high-capacity facilities would approach the forward-looking cost of the facility. Today, however, the cost of special access facilities remain significantly greater than the forward-looking cost even where ILECs have obtained pricing flexibility. By allowing CLECs to lease these facilities as UNEs, which as the Commission noted is an "opportunity Congress gave them," at forward looking prices, the costs of these facilities will gravitate to their forward-looking cost. Requiring CLECs to purchase loops via special access tariffs will only ensure that end users continue to pay inflated costs for these facilities.

(c) CLECs Are Generally Unable To Self-Provision High-Capacity Loops

The RBOC case for self-provisioning of high-capacity loops is centered around CLEC servicing of commercial office buildings. The RBOCs contend that CLEC are able to serve a large number of commercial office buildings with their own high-capacity loops. BellSouth puts the number at 175,000, which it claims represents 25% of all commercial buildings.[241] It is unclear how the RBOCs come up with these numbers because by their very admission they note

[241] Comments of BellSouth at 62.

that they do not know how many commercial buildings or business customers the CLECs serve. Verizon notes:

> CLECs do not report the number of commercial office buildings or business customers they serve over their fiber networks. Accordingly, it is difficult to determine exactly how many commercial office buildings connect to alternative high-capacity loop facilities.[242]

Thus, the RBOC numbers are mere speculation at best. This, of course, does not stop the RBOCs from throwing out these figures in support of their contention that CLECs are not impaired without access to high-capacity facilities. The RBOCs also significantly understate the amount of commercial buildings and overstate CLEC service to those buildings. The number of commercial office buildings does not count the millions of other commercial, industrial and government locations. There are 4.7 million commercial buildings.[243] Thus, even assuming *arguendo*, that CLECs serve a quarter of commercial office buildings, there are millions more of commercial buildings that have not been exposed to competition, and will not be able to partake of the benefits of competition, if unbundled access to high-capacity facilities is limited or eliminated. ILECs, meanwhile, will be able to serve every building in their region given the ubiquity of their networks.[244]

CLECs have penetrated less than 6% of commercial buildings and the near term prospects see only 30,000 to 60,000 buildings addressable nationally by CLEC fiber extensions.[245] The 175,000 figure by the RBOCs is overstated because it presumes that only one

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242 Comments of Verizon at 115.

243 Comments of WorldCom at 16, n. 20.

244 Comments of WorldCom at 16.

245 Comments of AT&T at 152.

competitor serves a building while in many cases multiple CLECs will be serving the same building. In addition, the RBOC figure includes buildings that are passed as being "on-net" regardless of whether CLECs are able to access those buildings by obtaining the necessary rights-of-way or building access arrangements.[246] Sprint actually created a database showing buildings served by what it terms Alternative Access Vendors and found that AAVs only serve a fraction of commercial office buildings compared to the near complete reach of the ILEC.[247] AT&T notes that it is able to connect only about 6,000 buildings on its network, and for those buildings, in most instances it can only serve a particular customer in the building rather than the entire building.[248] Thus, the amount of buildings served is not really a true indicator of competitive inroads, as CLECs may be only serving one customer in many of those buildings, while the ILEC serves all the rest of the customers. Moreover, this building count is totally irrelevant to CLECs that serve small businesses in large and small markets that are not in multi-tenant buildings. There are no alternatives for these customers.

The New York Public Service Commission has noted that the ILEC network dwarfs its competitors.[249] Even in LATA 132, which is in lower Manhattan, and which the Commission has found to be the most competitive area in the nation, Verizon's network serves 7,364 buildings and CLECs serve fewer than 1,000.[250] AT&T, which serves some of those buildings,

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246 *Id.* at 153.

247 Comments of Sprint at 23.

248 Comments of AT&T at 152.

249 Comments of WorldCom at 17.

250 Comments of AT&T at 158; Comments of WorldCom at 17.

notes than in most cases, it uses a combination of its facilities and ILEC facilities to serve those buildings.[251]

In addition, as WorldCom notes, the ability to serve a particular commercial office building, does not mean that a CLEC will be able to fully meet the needs of a business customer. Most businesses will have multiple locations, and not all of them will generate the same amount of traffic.[252] Thus, even if a CLEC can add one building to its network, the CLEC will still most likely have to rely on unbundled loops to serve the other locations.[253]

SBC contends that CLECs can routinely extend their network to serve new buildings and customers.[254] The process is far from routine, and as noted above, is quite rare. It costs WorldCom on average $250,000 to add a building to its network, and that is if the building is within a mile of its network. If not, the building will only be added as part of the construction of a new ring, which is a multi-million dollar project.[255] Thus, it will only consider adding a building if demand in that building is greater than a DS-3 which is very rare.[256] Even if the demand is there, CLECs face the hurdle of getting the building owner to allow access to the building. The price of such access is usually unreasonable fees or high rents.[257] One landlord is seeking $100,000 per year simply for the CLEC to access the building.[258] The high cost of

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251 Comments of AT&T at 158, n. 121.

252 Comments of WorldCom at 14.

253 *Id.* at 18.

254 Comments of SBC at 99; *see also,* Comments of Verizon at 116.

255 Comments of WorldCom at 19.

256 *Id.*

257 *Id.* at 20.

258 *Id.*

adding buildings to a network coupled with the downturn in capital markets will ensure that whatever pace of "building adds" may have existed before will be significantly curtailed.[259] Investors have grown increasingly wary of carriers that invest heavily in their own facilities before the requisite customer base has been secured.[260] Thus, CLECs are caught in a Catch-22. They cannot add new buildings without a substantial customer base, but they cannot build a customer base without adding new buildings. The ILECs meanwhile do not face this dilemma because they already have fiber deployed to buildings in their region and already have rights of access.

Time also works against the CLEC. Even if it has the requisite funding in place, it must first obtain a municipal right of way, and then a right of way from the landlord. Some landlords refuse to grant CLECs access, others only grant it at a huge price, and limit access to serving the particular customer.[261] At a minimum, it generally takes a CLEC six to nine months to add a building, and that is if it is able to secure the rights-of-way without much difficulty.[262] Meanwhile, the ILEC since it already has the facility in place and already has access, can provide the facility in a matter of days.[263] There is little doubt which timeframe the customer will prefer.

As noted above, the Supreme Court specifically identified loop elements as elements that are "very expensive to duplicate" and that entrants may need to share these elements.[264] The

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259 *Id.*

260 Sprint Comments at 22.

261 Comments of AT&T at 146.

262 Comments of WorldCom at 20.

263 *Id.*; Comments of AT&T at 147.

264 *Verizon* at 1672, n. 27.

millions of commercial buildings that are not reached by competitive networks, the exorbitant cost of adding buildings to a network, the rights-of-way and building access rights that need to be negotiated, and the fact that ILECs have facilities currently serving these buildings counsel for the continued unbundling of these loops. As an economic matter, it makes no sense to require a CLEC to overbuild these facilities. The Commission recognized that ILECs have built up this loop network over decades, and that loops in particular require a sunk investment that may be lost if the customer is lost.[265] If the Commission precludes unbundling of high-capacity loops, many buildings will never be served. The thousands of buildings not served by competitors in Manhattan, the most thriving business area in the U.S. is a testament to this proposition. Competitors must be allowed to share these loops.

(d) The CCG Report Corroborates CLEC Arguments About the Lack of Alternatives to High-Capacity Facilities

CCG Consulting, Inc. conducted a survey of CLEC operations in six markets: Albany, NY, Augusta, GA, Boston, MA, Chicago, IL, Corpus Christi, TX, and Portland, OR.[266] These cities were selected because they represented a cross-section of populations, business concentrations and serving incumbents.[267] The findings of the CCG Report corroborate the arguments above.

Table 1 of the Report shows the source of loop facilities leased by CLECs. For T1 and DS-3 facilities, CLECs lease the vast majority of facilities from the ILEC either as UNEs or on a

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265 *UNE Remand Order* at ¶¶ 184-185.

266 CCG Consulting, Inc., *State of CLEC Competition* (July 17, 2002) ("*CCG Report*").

267 *CCG Report* at 1.

retail basis.[268] In three markets, Augusta, Corpus Christi, and Portland, CLECs do not lease any T1s from third parties.[269] In Albany and Boston, the amount of T1 facilities leased from a third party is minimal. In Chicago, 2,161 of the CLECs' 18,067 leased T1s come from a third party.[270] As CCG noted, the third parties offering high-capacity facilities in the markets are always interexchange carriers. None of the CLECs in these markets sell wholesale loops of any kind to other CLECs. CCG cautions that even the number of third party loops may be overstated as purchasing from a third party does not automatically equate to using an alternative network to that of the ILEC. CCG believes that many of the third party loops are actually ILEC loops.[271]

CCG also examined how many buildings are served by CLEC fiber facilities. In three markets, Albany, Augusta and Corpus Christi, only one of the CLECs has at least one customer that is an On-Net customer.[272] The number of buildings connected to CLEC networks is minimal. In Albany, Augusta and Corpus Christi there are 24, 13 and 18 buildings connected respectively.[273] In none of the markets is there even one instance of one of the surveyed CLECs offering loops or dark fiber to other CLECs on a wholesale basis.[274] In the buildings served by CLEC fiber facilities, very few are fully equipped or fully utilized. For example a CLEC may

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268 *Id.* at 3.

269 *Id.*

270 *Id.*

271 *Id.* at 4.

272 On-Net is defined as a customer where the CLEC owns the loop and the electronics to reach the customer.

273 *CCG Report* at 6.

274 *Id.* at 6.

have an OC-48 terminal in a building, but only have it equipped with a few OC-3 cards. The percentage of lit circuits to potential fiber capacity in the buildings ranges from 0.6% to 4.9%.[275]

Thus, the following conclusions can be gleaned from the CCG Report:

CLECs rely on ILEC facilities for the overwhelming majority of their high-capacity loops;

Even the loops CLECs obtain from a third party may actually be ILEC loops that are being resold;

The number of buildings served by CLEC fiber is minimal, and in those buildings there is no wholesale market for loops or dark fiber;

Even when CLECs are able to deploy fiber to a building, the fiber facilities are rarely fully equipped or fully utilized which will certainly drive up their costs vis-à-vis the ILEC whose facilities will have much larger utilization factors.

The CCG Report demonstrates that the marketplace reality is far from what the RBOCs portray. CLECs still are very reliant on ILEC facilities, have very few alternatives to ILEC facilities, and have a long way to go to achieve the economies of scale and scope that the ILECs posses.

3. Shared Transport

SBC contends that if the Commission determines that ILECs must continue to offer unbundled shared transport in any market, it should clarify that shared transport need only be

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275 *Id.* at 6-7.

made available to support entry into the local services product market, not interexchange product markets – including the intraLATA toll market.[276] The Commission, however, has found that:

> Here, again, SBC argues that the obligation to provide shared transport extends only to the use of that UNE in connection with purely local service, not intraLATA toll. As noted above, however, the definition of shared transport in the UNE Remand Order (*i.e.*, the *Local Competition Third Order on Reconsideration*) contains no such express restriction, and the Commission's rules generally prohibit ILECs from imposing use restrictions on UNEs. Moreover, we note that in a decision that post-dates the UNE Remand Order, the Commission treated an allegation that SBC had unlawfully precluded competitors from using UNEs to provide intraLATA toll service as a section 271 checklist compliance issue. Thus, by implication, the Commission treated the matter as an issue of compliance with the Commission's UNE unbundling rules.[277]
>
> SBC has provided no reason for the Commission to depart from this finding.

Commenters are wary of the extension of use restrictions to other UNEs. Commenters noted how ILECs have manipulated the Commission's narrowly tailored use restrictions to deny EELs to CLECs.[278] Commenters chronicled how ILECs have engaged in "regulatory gamesmanship, legal 'hair-splitting,' and false allegations of 'CLEC misinterpretation' as a means of preventing CLECs from using EELs to provide competitive local services to consumers."[279] The ILECs have so "seriously misconstrued and otherwise taken advantage of the temporary restrictions necessary to achieve the Commission's stated policy goals, that EELs are largely unavailable to

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276 Comments of SBC at 81.

277 *In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture*, File No. EB-01-IH-0030, NAL/Acct No. 20023208004, FRN 004-3051-24, 0004-3335-71, 0005-1937-01, Notice of Apparent Liability for Forfeiture at ¶ 18 (Jan. 18, 2002).

278 Comments of ALTS *et al.* at 100.

279 *Id.*

CLECs."[280] Application of use restrictions to shared transport will only mire this UNE in the same situation, and preclude CLEC access to a vital market entry strategy.

E. Dark Fiber

Commenters believe strongly that CLECs are impaired on a nationwide basis without access to UNE dark fiber. Commenters direct the Commission to the separate reply comments filed by El Paso Networks, LLC. and CTC Communications Corp. in this proceeding in which this impairment concerning dark fiber is discussed and demonstrated.

F. Signaling Networks and Call-Related Databases

1. Signaling Networks

BellSouth conducts an extensive analysis on why CLEC should no longer have unbundled access to signaling networks. The information that BellSouth provides is nothing new. In fact, it is the very information that the Commission was aware of in 1999, but it still decided to provide unbundled access to signaling networks. There has never been any question as to the presence of alternative SS7 providers. The question remains whether any of the alternatives can match the ubiquity and quality of the ILECs' SS7 networks. The answer to that question remains no.

In regard to ubiquity, the only change to which BellSouth cites is that it no longer places a signaling transfer point (STP) in every LATA due to the Commission's defining the service as an incidental interLATA service.[281] As a result, BellSouth has reduced its number of STPs by 50%. BellSouth does not specify if this applies on a going-forward basis, or if it has actually

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280 *Id.*

removed STPs. Plus there is no indication if other ILECs have followed suit. At any rate, BellSouth, and other ILECs will still maintain a significant advantage in terms of ubiquity. Alternative providers only have geographically dispersed STPs and do not have local STPs, so the ILEC network remains the sole source of local STPs.[282] Alternative providers rely on a single STP pair to serve regions covering several states or indeed the entire country. For instance, Illuminet relies on only 14 STP pairs to serve 230 LATAs.[283] Thus, larger portions of their networks would be affected by a single point of failure.[284] For seven of Illuminet's STPs, it leases capacity from other network carriers, and thus does not own those STPs. Illuminet admits that it has no control over the "operation, quality and maintenance of a significant portion" of its network.[285] In fact, Illuminet has experienced numerous service outages that have impacted several carriers, and probably thousands of those carrier's customers.[286]

A very telling figure that BellSouth provides is that more than two dozen signaling networks are connected to BellSouth's SS7 network.[287] What this means is that even alternative providers still rely upon, and must tap into, the ubiquity of the ILEC network. Access to the ILEC SS7 network will be vital to the exchange of traffic.[288] The only way for a CLEC to set up

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281 Comments of BellSouth at 106-107.

282 Comments of WorldCom at 121.

283 Comments of Allegiance at 32.

284 *Id.*

285 *Id.* at 33.

286 *Id.*

287 Comments of BellSouth at 102.

288 Comments of ALTS *et al.* at 88.

and complete a call with an SS7-based ILEC switch is via the ILEC network.[289] Clearly alternative providers require this same type of access. Access to the ILEC SS7 network remains crucial for local call completion.[290] Access to the ILEC SS7 network will provide information as to which routes are least congested, and what is the best route for a call.[291] Thus, there is less of a chance of a call being blocked. In addition, since the ILEC call-related databases are connected to the ILEC SS7 network, CLECs need access to the SS7 network to obtain vital information for such things as Caller ID.[292] Moroever, national security and infrastructure are endangered if the maximum number of carriers possible are not directly connected together via SS7 to minimize the effects of any individual outages (*i.e.*, relying on third party vendors increases "single point of failure" exposure). Forcing carriers to pay more than cost (TELRIC) is manifestly bad policy.

Alternative SS7 networks do not provide the same functionality that access to ILEC SS7 networks provide. For instance, IXC wholesale SS7 offerings "provide only hubbing (*i.e.,* pure SS7 transmission) services without the capability to access service control points ("SCPs") or to perform local number portability functions."[293] Access to SCPs provide call routing, billing, and intelligent network database service functionality.[294]

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289 *Id.* at 89.

290 *Id.*.

291 Comments of WorldCom at 122.

292 *Id.*

293 Comments of Allegiance at 31.

294 *Id.*

It is beyond dispute that CLECs that purchase unbundled switching from the ILEC need access to the ILEC's SS7 network.[295] If facilities-based providers are denied access to the vital ILEC SS7 network this would serve as a disincentive to deploy switches.[296]

2. Call-Related Databases

As with access to signaling networks, the ILECs focus on the numbers of alternative providers as opposed to whether these alternatives provide CLECs with comparable quality and ubiquity, which were the considerations that drove the Commission to provide unbundled access to these databases.[297] In regard to these considerations, nothing has changed since 1999. There are still no alternatives of comparable quality and ubiquity to the ILEC's databases.[298] Much of the information in the ILEC's databases cannot be duplicated. For instance, an alternative provider cannot develop a line information database ("LIDB") without access to the ILEC's LIDB.[299]

For the CNAM database, the ILECs are the sole providers of CNAM database information for the vast majority of local customers.[300] Without access to this database, CLECs could not provide vital services such as Caller ID.[301] Thus, there is no question that CLECs would be impaired without access to this database. Commenters agree with WorldCom that access to this database via batch downloads will ensure that CLECs enjoy the same type of

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295 Comments of ALTS *et al.* at 87; Comments of WorldCom at 122.

296 Comments of WorldCom at 122.

297 *See UNE Remand Order* at ¶ 415.

298 Comments of WorldCom at 123.

299 *Id.* at 123.

300 *Id.* at 124.

access that ILECs have.[302] This will also facilitate the eventual completion of alternative databases of comparable quality to the ILEC database.

The Commission should also specify that CLECs are entitled to unbundled access to OS/DA databases. The Commission did not mandate such access in the *UNE Remand Order* because it presumed that since CLECs already were guaranteed non-discriminatory access under Section 251(b)(3) that would be sufficient.[303] This has led to ILECs seeking to charge, and state commissions approving, above-cost rates for directory assistance listings.[304] The Commission should require that unbundled access to these databases be provided at cost-based rates. The Commission has already found that ILECs continue to maintain near total control over the vast majority of directory listings and that the ILECs have the ability to leverage this control into market dominance.[305]

For alternative providers to duplicate these databases it will take time, significant capital, and continued access to the ILEC databases to populate the relevant information into the databases.[306] To preclude access to ILEC databases at this time will be to ensure that alternative databases will remain inferior to ILEC databases.

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301 *Id.*

302 *Id.* at 125-127.

303 *Id.* at 128.

304 *Id.*

305 *Id.* at 129.

306 *Id.* at 123.

The Commission's rule for call-related databases should continue to track the Commission's rule for signaling networks, because call-related databases are by definition "those SS7 databases used for billing and collection or used in transmission, routing or other provision of a telecommunications service."[307] As the Commission has noted, "our analysis of call-related databases is intertwined with our analysis of signaling, because signaling is necessary to obtain access to certain call-related databases."[308] Thus, as a result, the Commission held "our decision to unbundle the signaling network leads us to unbundle call-related databases."[309]

The record, as noted above and in Commenters' initial Comments, unequivocally demonstrates that CLECs would be impaired without access to ILEC signaling networks and call-related databases that are part of those signaling networks. Access to the SS7 network via the STP is necessary for the exchange of traffic. The ILEC has a single signaling network to move SS7 messages between the multiple switches on its network for call routing and for various features. The only way for a CLEC to set up and complete a call with an SS7-based ILEC switch is via this network. Likewise, alternative SS7 providers must also access the ILEC network via these same ILEC STPs. Given the inability of alternative SS7 providers to match the ubiquity of the ILEC network the alternative providers do not provide a functional substitute to CLECs. When the superiority of the ILEC call-related databases is factored in, lack of access to the ILEC signaling network would preclude the ability of CLECs to provide a comparable competitive

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307 *UNE Remand Order* at ¶ 400, n. 780.

308 *Id.* at ¶ 411.

309 *Id.*

product to that of the ILECs. Thus, the Commission must adhere to its national rule requiring unbundling of signaling networks and call-related databases.

G. Network Interface Devices and Inside Wire

BellSouth contends that the Commission should revert to its finding in the *Local Competition Order* that CLECs should not be allowed to connect its loops directly to the ILEC's NID. BellSouth contends that technical issues still remain in regard to a CLEC accessing the NID. Specifically BellSouth contends that such access may lead to hazardous power or lightning entering the customer's premises.[310] Yet, BellSouth goes on to suggest that such access is acceptable if there is spare capacity at the NID and the CLEC agrees to follow practices and procedures that ensure safety and continuity of service.[311] Thus, the idea that there are still technical issues that remain is undercut by BellSouth's statement that such access is acceptable if the CLECs meet certain conditions.

The Commission, however, should decline to impose the conditions that BellSouth seeks. First, it goes without saying that CLECs will follow proper grounding arrangements in wiring the loop to the NID. The CLEC will be serving the particular customer and will be the one that will be target of any complaints if the hazards BellSouth describe occur. Second, BellSouth states that the CLEC cannot have access to the NID if spare capacity is not available, and that the CLEC should not be permitted to disconnect ILEC facilities from the NID in order to place their own facilities. BellSouth says in such situations the CLEC can lease loops or subloops from

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310 Comments of BellSouth at 75.

311 *Id.* at 76.

ILECs that include the NID termination.[312] If the CLEC is servicing the customer with its own facility, there is no need to keep the ILEC facility connected, particularly if it would preclude CLEC access to the NID. It makes no sense to keep the ILEC loop connected, and require the CLEC to place a duplicative NID. The ILEC can easily reconnect its loop if it wins back the customer, and can do so more easily than requiring the CLEC to deploy its own NID. There are over 134 million residential and small business lines and they all terminate at a NID or some corresponding device. For CLECs to deploy tens of millions of duplicative NIDs would not be practical or efficient.[313] Also denying access to the NID will provide a disincentive for CLEC deployment of facilities.[314]

BellSouth also seeks to narrow the definition of inside wire claiming that the Commission incorrectly referred to certain ILEC owned intrabuilding plant as "inside wire" when inside wire actually designates facilities on the customer's side of a network demarcation point.[315] It is crucial that the Commission maintain its definition of inside wire given the fact that CLECs have had difficulty accessing multiple tenant environments ("MTEs"). MTE owners have charged CLECs unreasonably high entry rates and fail to negotiate CLEC access requests on a timely basis.[316] Thus, CLEC access to the NID and/or intrabuilding wire is the only way for the CLECs to provide service to MTE customers on a timely basis.[317]

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312 *Id.*

313 Comments of Sprint at 31.

314 *Id.* at 32.

315 Comments of BellSouth at 76.

316 Comments of WorldCom at 120.

317 *Id.*

H. OSS

There appears to be no dispute as the need to continue unbundled access to ILEC OSS. As Sprint notes, "nothing has changed since then to lessen CLECs' dependence on ILEC OSS."[318] There is still no substitute for access to ILEC OSS and CLECs have invested substantial sums in investing in interfaces to connect to ILEC OSS.[319] Thus, the Commission should continue to require the same access.

VII. COMBINATIONS OF UNBUNDLED NETWORK ELEMENTS

A. ILECs Must Provide New Combinations of Unbundled Network Elements

After almost six years of uncertainty surrounding the validity of the Commission's new UNE combination rules, the Supreme Court has definitively resolved the question of whether ILECs must provide CLECs access to new combinations of UNEs.[320] With its reinstatement of Rules 315(c) and (d), the Court has properly disposed of the ILECs' claims that they are under no duty to provision new UNE combinations. Therefore, ILECs may no longer continue to refuse to provide CLECs EELs and other new UNE combinations.

Instead, upon issuance of the Eighth Circuit's mandate on remand from the Supreme Court, ILECs must immediately comply with these rules by providing new UNE combinations requested by CLECs or be subject to an enforcement action for non-compliance. Specifically, ILECs must provide CLECs new EELs and other new UNE combinations, regardless of whether

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318 Comments of Sprint at 52; *see also* Comments of AT&T at 241.

319 Comments of WorldCom at 130.

320 The Court concluded that the rules "reflect a reasonable reading of the statute, meant to remove practical barriers to competitive entry to local-exchange markets" while avoiding serious interference with the ILECs' networks." 122 S.Ct. at 1685. *Verizon,* coupled with the Court's 1999 decision upholding Rule 315(b), firmly establishes that ILECs must provide requesting carriers unfettered access to both new and existing combinations of UNEs. *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 394.

the requested combination is ordinarily combined in the ILEC's network. ILECs must also combine UNEs with network elements possessed by the requesting CLEC. The ILECs' duty to provide new UNE combinations is subject to the condition that the requested combination is technically feasible and, with respect only to combinations that are not ordinarily combined in the ILEC's network, would not impair the ability of other carriers to obtain access to UNEs or to interconnect with the ILEC's network.

Because the new UNE combination rules have immediate and far-reaching significance for CLECs, Commenters urge the Commission to clarify the ILECs' duty under Rules 315(c) and (d) to provide new UNE combinations, as set forth below. In particular, the Commission must determine that the temporary use restrictions that have been applied to special access conversions do not apply to new UNE combinations. Clarification of these rules at the outset is vital to preclude ILECs from engaging in the same kind of regulatory gamesmanship that the ILECs have used with great success to deny CLECs access to EEL conversions. As explained in Commenters' initial comments, the ILECs have so seriously misconstrued the temporary local use restrictions that conversions of special access to UNE-priced EELs are largely unavailable to CLECs. And, as explained in Section III.B., *infra*, the Commission's inadequate response to the ILECs' recurring misinterpretations of the *Supplemental Order Clarification*[321] has led to the ill-reasoned and wrongly-decided *Net2000* decision.

The Commission should therefore clarify that:

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[321] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*").

- Rule 315(c) requires ILECs to perform the functions necessary to combine UNEs that are ordinarily combined within their networks, in the manner in which they are typically combined.[322]

- Rule 315(c) also requires ILECs to perform the functions necessary to combine UNEs that are not ordinarily combined within the ILEC's network and/or are not ordinarily combined in the manner requested, so long as the requested combination is technically feasible and would not impair the ability of other carriers to obtain access to UNEs or to interconnect with the ILEC's network.[323]

- Rule 315(d) requires ILECs to perform the functions necessary to combine UNEs with elements possessed by the requesting carrier in any technically feasible manner.[324]

- The *Supplemental Order Clarification* local use restrictions on EELs only apply to special access conversions and not to new UNE combinations.

This will hopefully put an end to the unwarranted delays that CLECs have experienced in obtaining EELs caused by ILECs intent on protecting their special access revenues. Clarification will also help to ensure that ILECs and requesting carriers understand the scope and nature of the ILECs' obligation to provide UNEs and thereby promote regulatory certainty for CLECs and other new entrants. This direction to ILECs will help free CLECs to innovate using the same network elements to which ILECs have enjoyed unrestricted access and thereby offer consumers a wealth of choices and technologies to serve their communications needs.

B. The *Supplemental Order Clarification's* Local Use Restrictions on Special Access Conversions Do Not Apply to New UNE Combinations

In response to the Supreme Court's reinstatement of the UNE combination rules, Verizon recently asserted that the local use restrictions set forth in the *Supplemental Order Clarification*

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322 47 C.F.R. § 51.315(c).

323 *Id.*

324 *Id.* § 51.315(d).

also apply to new UNE combinations.[325] Verizon's arguments, however, lack merit as discussed below, and the Commission should therefore dismiss them accordingly.

To begin with, special access conversions, by definition, concern combinations of network elements that are already combined in the ILEC's network. The Commission in the *UNE Remand Order* chose to address such existing arrangements (concluding that ILECs must provide at UNE pricing loop and transport combinations that are already combined in the ILEC's network) but specifically declined to decide whether ILECs have the same duty as to new combinations precisely because Rules 315(c) through (f) were pending appeal before the Eighth Circuit.[326] At no time, therefore, was it contemplated that the local use restrictions would have applicability beyond conversions of currently existing special access arrangements and Verizon's attempts to persuade the Commission otherwise are unavailing. In fact, Verizon's "support" for its assertion that the local use restrictions should also apply to new UNE combinations is an absurd patchwork of misrepresentation, misstatements, and half-truths, wholly lacking merit.[327]

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325 Letter from W. Scott Randolph, Director – Regulatory Affairs, Verizon Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 01-338, 96-98, and 98-147 (filed June 11, 2002) (*Verizon June 11, 2002 Ex Parte).*

326 *UNE Remand Order,* 15 FCC Rcd at 3909.

327 Verizon's supporting arguments are founded upon misquotation of the Commission's statements or mischaracterization of its actions. For example, Verizon states that "[i]n the *Supplemental Order Clarification*, the Commission confirmed its determination that ILECs are not required to provide combinations of unbundled loops and dedicated interoffice transport unless the requesting carrier uses those elements to provide a substantial amount of local exchange service." *Verizon June 11, 2002 ex parte*, Attachment at 1 (emphasis added).] This statement is misleading because it falsely implies that the Commission had already reached a final determination on the UNE combination issue. The Commission, however, made no such determination in the *Supplemental Order Clarification* because Rules 315(c) through (f) were pending before the Eighth Circuit. In fact, the Commission went on to state that "by issuing this clarification order, we do not decide any of the substantive issues in the *Fourth NPRM* on the merits." Verizon's statement is also misleading in that ignores the fact that the constraint adopted was merely a temporary measure.

Other assertions made by Verizon similarly lack support. Verizon argues that "[t]he *Supplemental Order Clarification* by its terms squarely applies to use of all loop/transport combinations – not just existing combinations – to provide special access service." From the beginning, however, the ILECs asserted to the Commission that

In addition, the record inarguably establishes that the Commission adopted the local use restrictions as a temporary measure to prevent IXCs from arbitraging the difference between regulated special access charges and cost-based UNE rates for loop and dedicated transport combinations.[328] In arguing for these restrictions, the ILECs assured the Commission that such restrictions would be needed only as a temporary safeguard until special access and universal service reform were implemented.[329] As Commenters explained in their initial comments, however, the ILECs' concern over special access charges has since been resolved with the Commission's adoption of the CALLS proposal and its implementation of universal service reform. Hence, the temporary "need" to protect ILEC special access revenue, which was based on ILEC claims that universal service "could" be harmed, can no longer be justified, if indeed it ever was.[330]

No reason exists, moreover, to assume that IXCs could use new combinations of UNEs to evade access charges. Attempting to move significant amounts of traffic from special access to UNEs would be complex and could risk service outages with the potential for substantial harm to

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"Sanctioning the use of such combinations . . . would confer an undue windfall on IXCs, who have used special access for years.[327] The "whole issue is whether CLECs and interexchange carriers may provide only access bypass, without also serving the incumbent's end user customers." BellSouth ex parte (filed Aug. 9, 1999).

328 *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order, 15 FCC Rcd 1760, 1761-62 (1999) ("*Supplemental Order*"), *Supplemental Order Clarification*, 15 FCC Rcd at 9592.

329 BellSouth ex parte at 1 (filed Aug. 9, 1999) (asserting that the local use restriction is justified to safeguard universal service "until new funding mechanisms are in place)."

330 Notably, in upholding Rule 315(b), the Supreme Court rejected the ILECs' argument that allowing competitors to obtain the UNE platform would amount to regulatory arbitrage, observing that "Section 254 requires that universal service subsidies be phased out, so whatever possibility of arbitrage remains will be only temporary." *Iowa Utils. Bd.*, 525 U.S. at 394 (emphasis added).

end user customers. Significantly, there is no evidence that IXCs have even attempted to do so where CLECs have been able to obtain new EELs, such as in Georgia.

In view of the fact that the ILECs' dire forecasts of precipitous reductions in special access revenue and resulting harms to universal service have not materialized, there is simply no policy support for imposing such restrictions on new UNE combinations nor for continuing to allow such restrictions to be imposed on EEL conversions.[331] Nor is there any basis for protecting ILEC special access revenue in any event.

Finally, there is no lawful basis for the Commission to impose any use restrictions on new combinations of UNEs. Once the Commission has determined pursuant to Section 252(d)(2)'s access standards that a network element should be unbundled, Section 251(c)(3) requires ILECs to provide nondiscriminatory access to such network element in a manner that allows requesting carriers "to combine such elements" in order to provide any "telecommunications service" they choose to offer.[332] Nothing in the plain language of Section 251(c)(3) permits use restrictions to be imposed on requesting carriers seeking access to new UNE combinations.

The Commission has already concluded that Section 251(c)(3) does not allow the imposition of "any service-related restrictions or requirements on requesting carriers in

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331 *See* discussion at Section II.D., *infra.*

332 47 U.S.C. § 251(c)(3). Section 215(c)(3) imposes upon ILECs the "duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . . [and to] provide such elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

connection with the use of unbundled elements."[333] ILECs, the Commission concluded, must allow requesting carriers "to combine [network] elements as they choose" and may not impose restrictions upon the uses to which requesting carriers put such network elements.[334] The Commission emphasized in particular that when UNEs are already combined as a special access circuit, ILECs may not separate them under Rule 51.315(b).[335] In such situations, the Commission warned, "it would be impermissible for an incumbent LEC to require that a requesting carrier provide a certain amount of local service over such facilities."[336]

The Commission's rules reflect its conclusion that the Act prohibits ILECs from restricting the use of unbundled network elements by requesting carriers. Rule 51.307(c) unequivocally establishes that requesting carriers are free to provide any telecommunications

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333 The Commission in the *Local Competition Order* and in the *UNE Remand Order* recognized that Section 251(c)(3) prohibits the imposition of restrictions on the use of unbundled network elements by requesting carriers. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15679 (1999) ("*Local Competition Order*") (explaining that its conclusion not to impose usage restrictions on the use of unbundled network elements was "compelled by the plain language of the 1996 Act). As a consequence, the Commission rejected ILEC calls for restrictions to be imposed upon requesting carriers seeking unbundled loop and dedicated transport combinations, declaring that "[a]s an initial matter, under existing law, a requesting carrier is entitled to obtain existing combinations of loops and transport between the end user and the ILEC's serving wire center on an unrestricted basis at [UNE] prices." *UNE Remand Order*, 15 FCC Rcd at 3912 (emphasis added).

In the *Supplemental Order*, however, the Commission abruptly and inexplicably departed from its long-held conclusion. *Supplemental Order*, 15 FCC Rcd at 1762. There, the Commission solicited comment on whether the Act would support limiting the availability of EELs to local exchange service, observing that: "As we stated in the *Third Report and Order and Fourth FNPRM*, in light of the fact that it is not clear that the 1996 Act permits any restrictions to be placed on the use of unbundled network elements, we particularly urge the parties to consider and address what long term solutions may be necessary to avoid adverse effects on any special access revenues that might support universal service. *Id.* ¶ (emphasis added). The footnote to this paragraph references paragraph 484 of the *UNE Remand Order*. Upon review of paragraph 484, however, it is evident that this paragraph contains no language stating, much less implying, that the Commission was anything other than convinced that the plain language of the Act does not permit usage restrictions on UNEs.

334 *UNE Remand Order*, 15 FCC Rcd at 3911.

335 *Id.* at 3912.

service that can be offered by means of that network element.[337] Rule 51.309(a) prohibits ILECs from imposing any usage restrictions on "any telecommunications service" the carrier seeks to offer.[338] As the Commission aptly observed in the *UNE Remand Order*, Rule 51.309(a) "was not challenged in court by any party." [339] In adopting these rules, the Commission clearly intended to prevent ILECs from interfering with requesting carriers' exercise of the right to provide any telecommunications service it desires to offer by means of the UNEs requested.

There has been no change in the law or policy that would form a rational basis for the Commission's departure from its long-held conclusion that imposing usage restrictions on UNEs would violate the Act. As stated above, as long as a requesting carrier uses UNEs to provide "a telecommunications service," that use is permissible under section 251(c)(3). No legal or policy basis exists for the Commission to impose use restrictions on new combinations of UNEs. Accordingly, the Commission should not, and may not, apply local use restrictions to new combinations of network elements.

C. The Commission Must Reject ILEC Calls for a Blanket Prohibition on All Special Access Conversions, Including EEL Conversions

In their comments SBC and Verizon call for an outright prohibition on all conversions of special access circuits to UNEs. CLECs, Verizon asserts, "should have no right to convert

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336 *Id.*

337 Rule 51.307(c) requires ILECs to provide access to UNEs, "along with all of the [UNE's] features, functions, and capabilities, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element." 47 C.F.R. § 51.307(a).

338 Rule 51.309(a) states that ILECs "shall not impose limitations, restrictions, or requirements on . . . the use of unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends." 47 C.F.R. § 51.309(a).

339 *UNE Remand Order*, 15 FCC Rcd at 3912.

special access service to UNE combinations, and therefore, *the safe harbors should be eliminated.*"[340] SBC argues that "[t]aking proper account of the existing universal service regime – the Commission should refuse to permit CLECs to convert special access circuits to UNEs *in any circumstances.*"[341]

Before turning to their arguments, Commenters must underscore the overarching fact that, by this request, SBC and Verizon flagrantly disavow and repudiate the Commission's local use options – the very local use options that two years ago SBC and Verizon expressly agreed were permitted under existing law.[342] In an effort to distance themselves from their previous support for local use restrictions, SBC and Verizon studiously avoid using the terms "EEL" and "safe harbors" in their arguments for a blanket prohibition on all special access conversions.[343]

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340 Comments of Verizon at 52, fn. 186 (emphasis added).

341 Comments of SBC at (v) (emphasis added).

342 Joint ex parte letter of Bell Atlantic, Intermedia, BellSouth, SBC, Focal, Time Warner, GTE, US West, and WinStar, CC Docket No. 96-98 (filed Feb. 29, 2000) ("*Joint ILEC-CLEC Compromise*"). Two years ago, SBC and Verizon (then, Bell Atlantic) were among the group of ILECs and CLECs that proposed to the Commission the local use restrictions on special access conversions, which the Commission ultimately adopted as safe harbors from the temporary constraint it imposed upon IXC conversions of special access. SBC and Verizon stated: "The undersigned believe that, under existing rules and policies reflected in the [*Supplemental Order* and *Supplemental Order Clarification*], a requesting carrier may purchase loop/transport combinations only if one of the three options described below is met." *Joint ILEC-CLEC Compromise* at 1. The ILECs represented to the Commission and these CLEC that they only needed such restrictions to safeguard against IXC special access bypass and that they would readily convert EELs for CLECs that fell under one the safe harbors. The ILECs assured the Commission that the temporary restrictions could be removed once universal service and access charge reform were fully implemented. Since then, however, the ILECs have systematically frustrated CLEC attempts to obtain EEL conversions.

343 Verizon refers to the term "safe harbor" only once – in footnote 186, quoted in the above text. Neither uses the term "EEL" in their arguments to disallow special access conversions. SBC's and Verizon's strategy for persuading the Commission that the proposed prohibition is necessary appears to have at least five components: first, refrain from using the terms "EEL" or "safe harbor" anywhere in their comments; second, avoid mention of the IXC special access arbitrage issue; third, ignore the fact that the Commission since 1999 has recognized that requesting carriers are entitled to obtain existing special access service on an unrestricted basis at UNE pricing; and fourth, argue that requesting carriers are not impaired in their ability to offer special access service.

This is done presumably in the hope that the Commission will have forgotten the substantial role each ILEC played in persuading the Commission to establish the temporary constraint on special access conversions that gave rise to the safe harbors in the first place.[344] The Commission, however, should not be so easily misled.

As explained in Commenters' initial comments, CLECs have become collateral damage in the special access/EEL battle being waged between ILECs and IXCs. There, Commenters explained that "No one, not even the ILECs, has argued that CLECs should be denied access to EELs." Commenters and this Commission, however, apparently have underestimated the ILECs' readiness to game the regulatory process at each turn. The ILECs, apparently not satisfied with simply denying IXCs special access conversions, now seek to rid themselves altogether of the obligation of converting any special access circuits for *CLECs* and any other requesting carriers as well. In view of the active role that SBC and Verizon played in establishing the safe harbors and their express agreement to allow CLECs to convert special access where a safe harbor option is satisfied, the Commission should soundly reject this maneuver as gross overreaching by the ILECs.

As to the ILECs' arguments in support of a blanket prohibition on special access conversions, SBC and Verizon raise several, none of which have merit in light of the Supreme Court's holding in *Verizon*. Verizon contends that a carrier is not impaired if it competes using

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[344] The ILECs succeeded in convincing the Commission that universal service funding would be threatened if IXCs were not restricted from converting special access to UNE combinations. As noted above, Verizon and SBC, signatories to the *Joint ILEC-CLEC Compromise* were instrumental in convincing the Commission to adopt in the *Supplemental Order Clarification* the safe harbor options for establishing whether a requesting carrier provides a "significant amount of local exchange service" to a particular customer. *Supplemental Order Clarification*, 15 FCC Rcd at 9598 (expressing the Commission's belief that the *Joint ILEC-CLEC Compromise* is a "reasonable compromise proposal for determining what constitutes a significant amount of local exchange service to a particular end user.")

an ILEC's tariffed service; that the special access market is already competitive; that permitting requesting carriers to substitute UNEs for special access would undermine facilities-based competition; and that ILEC revenues lost to special access conversions would diminish the ILECs' ability to continue offering high quality services.[345] SBC raises similar arguments and further claims that requiring ILECs to permit special access conversions is unlawful and would undercut universal service support.[346]

There has been no change in law or policy, however, that would support denial of CLECs' right to obtain special access/EEL conversions. To the contrary, the Supreme Court in *Verizon* has removed all doubt as to the ILECs' Section 251(c)(3) duty to provide UNE combinations.[347] Indeed, the Court has already upheld Rule 315(b), which prohibits ILECs from separating UNEs that the ILEC currently combines which a requesting carrier orders in combination.[348] The only change that has occurred is the ILECs' desire to preclude CLECs – with the Commission's permission – as well as IXCs, from obtaining special access/EEL conversions. Given that the Supreme Court has conclusively held that ILECs are required to provide nondiscriminatory access to UNE combinations, it is to be hoped that SBC and Verizon will voluntarily abandon these arguments. If, however, they do not, the Commission should soundly reject their request for a blanket prohibition on special access conversions as gross overreaching and unsupported by either law or policy.

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345 Comments of Verizon at 137-39.

346 Comments of SBC at 105-08.

347 See discussion in Section VII. A. of these reply comments.

348 *Iowa Utils. Bd.*, 525 U.S. at 394-95.

D. The Commission Should Terminate the "Temporary" Use Restrictions on Special Access/EEL Conversions

In the *UNE Remand Order*, the Commission emphasized that under Section 251(c)(3) and Rule 315(b), ILECs are currently obligated to provide requesting carriers UNE combinations that already exist in combined form in the ILEC's network.[349] Despite this clear pronouncement, however, nearly three years later few CLECs have succeeded in obtaining EELs -- a result that bears solid witness to the ILECs' ability to game the regulatory process. As discussed in the Commenters' initial comments, the ILECs have succeeded in complicating, limiting and even precluding the use of EELs by CLECs by means of a prolonged campaign of recurring misinterpretations of the *Supplemental Order Clarification*, legal "hair-splitting," false allegations of "CLEC misinterpretation," intransigence, and other dilatory tactics.[350] ILECs are now additionally engaging in unreasonable audit practices.[351] Accordingly, contrary to the Commission's intent in mandating special access/EEL conversions, ILECs have thwarted CLECs' right under Section 315(b) of the Commission's rules to obtain unbundled access to network elements that are already combined.

As explained in Section II.B., *supra*, however, there is no legal basis for imposing restrictions on the use of new UNE combinations and it is certainly questionable whether the

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349 *UNE Remand Order*, 15 FCC Rcd at 3909, 3912.

350 *See* ALTS ex parte (filed Dec. 22, 2000) (detailing widespread problems in obtaining special access/EEL conversions, most of which are unlawful or, at a minimum contravene the *Supplemental Order Clarification*. The ILECs' unlawful and anticompetitive practices and tactics include refusing to make EELs available, imposing restrictions and preconditions on EEL requests, pre-auditing, excessive delays to obtain requested conversions (*e.g.*, longer than 10 months), disconnecting service, and requiring onerous ordering procedures. These tactics were reported to ALTS by its member CLECs, including Actel, ATG, Avista, e.spire, Electric Lightwave, Focal, Intermedia, Jato, Net2000, US LEC, and XO Communications, and are representative of the tactics the ILECs have used to deny CLECs access to EEL conversions.

351 *See e.g.*, Joint Comments of Cbeyond, e.spire, KMC Telecom, Net2000, and XO (filed Apr. 5, 2001) (reporting ILEC pre-auditing of CLECs' EEL conversion requests).

temporary use restrictions themselves are lawful. Moreover, the policy reasons that the Commission used to initially justify these "temporary" restrictions have been fully satisfied.[352] Specifically, the Commission justified these restrictions in order to preserve universal service funding implicit in ILEC interstate access charges. However, the *CALLS Order* purportedly removed from interstate access charges all implicit support for universal service.[353] Therefore, the continuation of these use restrictions is without any foundation and, at this point, is totally arbitrary. The Commission should at this time terminate these restrictions.

E. The Commission Should Establish a Workable Process for EEL Conversions.

As explained above, the Commission should at this time terminate the "temporary" local use restrictions applicable to special access/EEL conversions. If, however, the Commission determines to retain the temporary use restrictions on EEL conversions, the Commission should reverse *Net2000*, as discussed in Section III.B., *infra*. The Commission should also adopt other proposals that will be submitted by CLECs in this proceeding that could make the special access/EEL conversion process workable. The Commission should also specifically prohibit the

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[352] The Commission imposed the temporary constraint on IXC conversions of special access on November 9, 1999, as an interim measure that was not intended to affect the ability of requesting carriers to use EELs. *Supplemental Order*, 15 FCC Rcd at 1761-63. The Commission stated that the constraint would continue until "resolution of the Fourth NPRM, which will occur on or before June 30, 2000." *Id.* at 1761. The Commission, however, in the *Supplemental Order Clarification*, extended the local use restrictions "until we resolve the issues in the Fourth NPRM," stating that the extension would allow the Commission to "compile an adequate record for addressing the legal and policy disputes presented here. *Supplemental Order Clarification*, 15 FCC Rcd at 9587, 9592.

[353] *Access Charge Reform*, CC Docket Nos. 96-262, Sixth Report and Order, *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, Sixth Report and Order, *Low-Volume Long-Distance Users,* CC Docket No. 99-249, Report and Order, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 11th Report and Order, FCC 00-193, 15 FCC Rcd 12962 (2000) ("*CALLS Order*"). It is worth noting that if ILEC arguments were true that the special access market is fully competitive, then there would be no implicit universal service support in special access charges, thus also invalidating the basis for the local use restrictions. However, the special access market is not competitive and ILECs are enjoying supra-competitive rates while separately receiving universal service support established in the *CALLS Order*.

unauthorized preconditions on conversions that BellSouth has attempted to impose.[354] The Commission should also prohibit ILEC audit abuses as detailed in the NuVox petition.[355]

In addition, Commenters recommend that the Commission establish a streamlined process for ILEC provisioning of EEL conversions. Currently the ILECs' ordering process for EEL conversions requires CLECs to submit two separate orders to the ILEC: one order for special access service, followed by second order for conversion of the special access circuits to EELs. This cumbersome process serves no purpose other than to complicate the ordering process for no productive reason and allow ILECs to impose wasteful reconnection costs on the ILECs' competitors.

In its place, ILECs should be required to follow a streamlined process that would allow CLECs to place a single order for conversions of special access arrangements to EELs. A single order process would allow CLECs to avoid unnecessary delays inherent in processing two separate orders for what should be a single order for a single CLEC customer. A single order process would also allow CLECs to avoid the risk of multiple ILEC processing errors that would attend provisioning the EEL to a CLEC single customer from two separate order forms.

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354 For example, BellSouth sought to impose the following restrictions on EELs: loop/transport combinations cannot be used by new entrants to provide special access service; combinations would be available for only two years commencing upon when BellSouth obtains Section 271 approval; customers must be in service for six months before they may be served through a UNE combination; combinations would only be available in BellSouth rate groups 2 and 5 areas; and loop-transport combinations must terminate on a CLEC circuit-switched, local voice switch. *Georgia UNE Combinations Order* at 12. The Georgia commission rejected BellSouth's proposed use restrictions as discriminatory in violation of the nondiscriminatory access requirement of the Act and FCC rules. *Id.* at 13. The commission also rejected BellSouth's arguments that the restrictions were justified to create appropriate economic incentives and ensure that the use of combinations dose not stifle the growth of competition. *Id.*

355 Petition for Declaratory Rulemaking of NuVox, Inc., CC Docket 96-98 (filed May 17, 2002).

VIII. THE COMMISSION MUST PROHIBIT A NUMBER OF CURRENT ILEC EXCUSES NOT TO PROVIDE UNES AND ESTABLISH A "PROVISION THE UNE WHILE PROTESTING" RULE

A. ILECs Have Failed to Justify Their "No Facilities" Policy

Verizon argues that "adding capacity to a switch, or placing new line cards or electronics on a circuit are all examples of substantial alterations to an ILEC's existing network," that they are not required to perform because they constitute "superior quality" access to network elements.[356]

As discussed in Commenters' comments in this proceeding, Verizon's "no facilities" policy is based on an erroneous reading of the Eighth Circuit's decision regarding the Commission's "superior network" rules.[357] Specifically, requiring ILECs to perform minor modifications to their existing networks to fill CLEC orders (such as adding line cards, multiplexers, and other electronics) is not inconsistent with the Eighth Circuit's holding that Section 251(c)(3) does not require ILECs to provide access to a "yet unbuilt superior [network]." CLECs are not requesting ILECs to build an as yet "unbuilt superior network," but instead request that ILECs undertake the placement, augmentation, modification and replacement of facilities that the ILECs provide to their own special access, DS-1, DS-3, OCN and other customers, and which is routine in the existing ILEC networks. Thus, CLECs are not seeking a superior network, but nondiscriminatory unbundled access to the existing network as required by 251(c)(3). Moreover, the Eighth Circuit specifically endorsed the Commission's determination

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356 Comments of Verizon at 63.

357 Comments of ALTS *et al.* at 107-109.

that Section 251(c)(3) requires ILECs to make modifications to their facilities to accommodate interconnection and access to UNEs.[358]

The Commission also has reiterated in previous orders that such actions on the part of ILECs do not constitute "superior quality" network elements.[359] Instead, they are required in order to provide requesting carriers with nondiscriminatory access to the features, functions and capabilities that by definition constitute a given network element.[360] The Commission previously has rejected similar ILEC arguments and should reject Verizon's argument in support of ILEC "no facilities" policies.[361]

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[358] *Iowa Utilities Board v. AT&T*, 120 F.3d 753, 813 (8th Cir. 1997), appealed on other grounds, 119 S.Ct. 721 (1999).

[359] Verizon's assertion that the Commission recognized in the *Local Competition Order* that "loop conditioning plainly is an unlawful requirement to provide a superior quality network" (citing 11 FCC Rcd 15499, 15659) is puzzling at best. There is no reference to loop conditioning on the page cited by Verizon, and there appears to be nothing elsewhere in the *Local Competition Order* that supports Verizon's statement. To the contrary, the Commission rejected BellSouth's argument that requesting carriers "'take the LEC networks as they find them' with respect to unbundled network elements," and specifically found that some modification of incumbent LEC facilities, such as loop conditioning, is encompassed within the duty imposed by section 251(C)(3)." 11 FCC Rcd 15499, 15692, para. 382. The Commission also specifically found that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." *Id.* at para. 198. Moreover, in the *UNE Remand Order* the Commission noted that the Eighth Circuit in *Iowa Utils. Bd. v. FCC* "expressly affirmed the Commission's determination that section 251(c)(3) requires incumbent LECs to provide modifications to their facilities to the extent necessary to accommodate access to network elements." *UNE Remand Order*, para. 173, citing *Iowa Utils Bd. v. FCC*, 120 F.3d at 813, n.33. Accordingly, the Commission found that "loop conditioning, rather than providing a 'superior quality' loop, in fact enables a requesting carrier to use the basic loop," and therefore falls within the definition of loop network element, because without such loop conditioning "competitors cannot access the loop with all its native 'features, functions, and capabilties.'" *Id.* at para 173. See also *UNE Remand Order* para. 167and n.301 (in accordance with section 3(29) of the Act which defines network elements to include their 'features, functions and capabilities," the revised definition of "local loop" "makes explicit that dark fiber and loop conditioning are among the 'features, functions and capabilities' of the loop.")

[360] The term "network element" is defined under the Act to include the "features, functions, and capabilities" that are provided by means of such facilities or equipment. 47 U.S.C. § 153(29).

[361] It is noteworthy that the Hearing Examiner's Report regarding Verizon Virginia Inc.'s Section 271 application found that Verizon's "no facilities" policy "has a significant and adverse effect on competition in Virginia, is inconsistently applied across UNEs, is at odds with industry accounting rules, and is inconsistent with the pricing of unbundled elements." *In the matter of Verizon Virginia Inc. to Verify Compliance With the Conditions Set Forth in 47 U.S.C. § 271(c)*, Report of Hearing Examiner, Virginia State Corporation Commission Case No. PUC-2002-00046, at 2, 116 (July 12, 2002).

Similarly, the Commission also should reject Verizon's assertion that "[t]he Commission's existing rules already confirm that an ILEC need not deploy additional electronics on a loop."[362] By negative implication, Verizon reads the Commission's definition of the term "local loop" to exclude what Verizon refers to as "unattached electronics," because the definition explicitly includes "attached electronics" but does not mention "unattached electronics." The Commission should dismiss Verizon's argument for several reasons. First, the definition of "local loop" clearly is not limited to exclude features, functions, and capabilities not specifically listed in the definition. Instead, the definition specifically states that the features, functions, and capabilities of the local loop "*include, but are not limited to*" the examples listed therein.[363] In any event, the reference to "attached electronics" in the definition of local loop requires ILECs to provide what Verizon refers to as "unattached electronics" in order to provide requesting carriers with nondiscriminatory access to the full features, functions, and capabilities of the local loop. That is, "attached electronics" simply means the electronics required to provide access to the features, functions and capabilities of the local loop, in the same manner that ILECs ordinarily provide such attached electronics to their retail customers.

Taken to its logical conclusion, Verizon's argument that "unattached electronics" should be excluded from the definition of the local loop implies that: (1) CLECs could never be the first carrier to sell advanced services to customers (instead they would always have to wait for the ILEC to provision such services); and (2) ILECs would not be required to maintain any maintenance or replacement inventory for CLEC orders since any such electronics would not be

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362 Comments of Verizon at 63, n. 215.

363 47 C.F.R. § 51.319(a)(1).

"attached." Such a result would be completely inconsistent with the pro-competitive goals of the Act and the requirements of Section 251(c)(3) that the ILECs provide UNEs on terms and conditions that are just, reasonable and nondiscriminatory. Moreover, the Commission reiterated that its intention in defining the term "local loop" is "to ensure that the loop definition will apply to new as well as current technologies, and to ensure that competitors will continue to be able to access loops as an unbundled network element as long as that access is required pursuant to section 251(d)(2) standards."[364] Accordingly, the Commission should reject Verizon's argument that ILECs are not required to deploy additional electronics on a loop.

Verizon also argues that line conditioning is defined as "removal " from the loop of various devices, but not the attachment of electronics.[365] As discussed in Commenters' initial comments, there is no meaningful legal distinction under Section 251(c)(3) or elsewhere in the Act that supports a different rule for the provision of UNEs based on whether an ILEC removes or adds equipment.[366] Instead, the Commission should confirm that ILECs must affirmatively take steps to provide to CLECs the same functionality for UNEs that they use for their own special access, exchange access, DS-n and other customers, whether modifications entail additions to or removal of equipment from the loop.

Commenters reiterate that Verizon's "no facilities" policies regarding CLEC UNE orders is discriminatory and unreasonable in violation of Section 251(c)(3) of the Act, because Verizon generally will modify, reconfigure or augment electronics to provide facilities or services for its own customers and to carriers only at non-TELRIC prices (tariffed rates), but will not do so for

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364 *UNE Remand Order* at para. 167.

365 Comments of Verizon at 63, n. 215.

carriers requesting UNEs. Moreover, Verizon's "no facilities" policies are highly anti-competitive and impede consumer choice for high-capacity services. The Commission should confirm that ILECs must perform modifications such as loop conditioning, adding line cards, multiplexers, and other electronics in order to provide requesting carriers with the full "features, functions, and capabilities" of network elements,[367] and in accordance with the requirement under Section 251(c)(3) that ILECs provide nondiscriminatory access to UNEs on terms and conditions that are "just, reasonable, and nondiscriminatory."

B. *Net 2000* Was Wrongly Decided and Must be Reversed

In reinstating Rule 315(c) and (d), the Court plainly recognized the power that ILECs wield over their competitors through their control of bottleneck facilities.[368] Not only can ILECs restrict connections to their facilities, but they can place conditions or fees on carriers seeking to connect with their networks. Competitors, the Supreme Court observed in *Verizon* "would be forced to comply with these conditions or [they] could never reach the customers of a local exchange." The ILECs' refusal to provide UNE combinations has had precisely that result: CLECs seeking access to EELs and other UNE combinations have been forced to comply with the ILECs conditions on special access conversions or forfeit reaching the ILECs' local customers.

The CLECs' ongoing frustration with ILECs over EEL conversions is illustrated, in some measure, by the situation Net2000 faced in its dispute with Verizon to obtain EELs. The

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366 Comments of ALTS *et al* at 109.

367 47 U.S.C. 153(29).

368 The Court observed that "ILECs could thwart competitors simply by refusing to lease an element except in combination with others that the requesting carrier does not need or to allow the leased elements to be combined with a competitor's own equipment."

Commission, however, in addressing the Net2000-Verizon dispute has decided the matter in a manner that exacerbates rather than relieves the problems that CLECs must face if they refuse (as indeed they must if they are to survive) to forfeit reaching the ILECs' customers.

In this connection, the Commission has failed to correct its misunderstanding as to the existence of a "co-mingling" prohibition. The detailed record in this proceeding on this issue reflects that CLECs and other new entrants have repeatedly explained to the Commission just how the "co-mingling" prohibition came into being.[369] CLECs have shown that there is no statutory basis for the prohibition. Despite these efforts, however, the Commission has refused to clarify the record by establishing that no such prohibition exists and, in an extraordinary misstep in *Net2000*, accepted as its own the ILEC-fabricated co-mingling prohibition.[370] Commenters can think of few actions more questionable than the Commission engaging in rulemaking with sweeping implications beyond the interests of the named parties, in the context of a restricted enforcement proceeding and without industry-wide participation.

As discussed below, the Enforcement Bureau failed to comprehend or flatly misinterpreted the "co-mingling" restrictions in safe harbor options. In allowing yet another layer of restrictions to be imposed on EEL conversions, *Net2000* was wrongly decided.

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[369] Numerous CLECs and other commenters have established in this proceeding that the "co-mingling" prohibition has no legal basis whatsoever. *See e.g.,* ALTS ex parte (filed Aug. 9, 2001) (explaining that ILECs have invented an EEL conversion prohibition that does not appear in the joint ILEC-CLEC compromise proposal or the *Supplemental Order Clarification*); ALTS ex parte (filed July 26, 2001) (requesting that the Commission resolve the issue of ILEC denial of EEL conversions based on misinterpretation of the FCC's orders); ALTS comments (filed Apr. 5, 2001) (explaining that ILECs have latched onto a loophole in the *Supplemental Order Clarification* to unilaterally establish unnecessary restrictions against co-mingling of EELs with special access tariffed services); Joint Comments of Cbeyond, e.spire, KMC Telecom, Net2000, WinStar, and XO Communications (filed Apr. 5, 2001) (explaining that ILECs incorrectly rely on purported prohibition in *Supplemental Order Clarification* to refuse to convert DS-1s multiplexed to DS-3s); Focal comments (filed Apr. 5, 2001) (noting that no basis exists and that the Commission never asserted a legal basis for the "co-mingling" prohibition).

Commenters urge the Commission to reverse this decision and reestablish CLECs' right under Section 251(c)(3) of the Act to obtain EELs without the imposition of restrictions or conditions of the use of such combinations.

At issue in *Net2000* was Verizon's refusal to convert DS-1 circuits that were multiplexed onto tariffed DS-3 transport channel that would include DS-1 circuits that continue to be provided under tariff.[371] Verizon had claimed that converting these circuits would violate the Commission's prohibition against co-mingling. Net2000 had argued that circuit eligibility for EEL conversion should be judged on an end-user-by end-user basis. Net2000 had also argued that ratcheting be used to price proportionately DS-3 circuits derived from both EEL-eligible and non-EEL-eligible circuits.[372]

The Enforcement Bureau rejected Net2000's argument, declaring that Net2000 had "ignored" the language of safe harbor Option 3.[373]

> There is no provision anywhere in the *Supplemental Order Clarification*, or in prior orders for "ratcheting." The language of Option 3 clearly and specifically requires that "[w]hen a loop-transport combination includes multiplexing (*e.g.*, DS1 multiplexed to DS3 level), each of the individual DS1 circuits must meet [the substantial local exchange service use] criteria." There is no ambiguity in this language.[374]

Contrary to the Bureau's assertions, however, the language of Option 3 (and that of Option 2, which includes the same language) is ambiguous and the ILECs have seized upon and

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370 *Net2000 Comms. v. Verizon*, File No. EB-00-018, FCC 01-381, Memorandum Opinion and Order (rel. Jan. 9, 2002) ("*Net2000*").

371 *Id.* ¶¶ 11-16.

372 *Id.* ¶ 28.

373 *Id.*

374 *Id.*

misinterpreted this language to produce a result that was never intended by the carriers, both CLECs and ILECs, that negotiated and proposed the safe harbor options.

There is no legal or policy basis for the ILECs' assertion that the "significantly local " test applies to an entire DS-3 transport circuit as a whole.[375] To the contrary, the Commission's orders make clear that eligibility for EEL conversions is to be determined based on the amount of local exchange services provided *to the particular end user*. The *Supplemental Order* reaffirmed that if a requesting carrier provided a significant amount of local exchange service to a particular customer, the carrier could receive UNE pricing for the network elements.[376] Similarly, the safe harbor options in the *Supplemental Order Clarification* apply on an end-user-by-end-user basis.[377]

The sole issue therefore is whether, for the particular end user involved, the CLEC is providing the requisite amount of local traffic specified in the relevant option. Because DS-1 circuits are dedicated to particular users, the only logical way to determine this is on a DS-1 circuit-by-DS-1 circuit basis. Once a requesting carrier certifies that it has a particular DS-1 circuit and falls within a safe harbor, ILECs may not lawfully impose any restriction or requirement upon the CLEC's request to convert the eligible circuit to an EEL.

The amount of local exchange traffic carried on each of the remaining DS-1 circuits riding the DS-3 circuit on which the converted DS-1 also rides is irrelevant. Any other

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375 As discussed in our initial comments, the "co-mingling restriction" should be eliminated because it permits ILECs to wrongfully deny CLECs conversions of EEL-eligible circuits in the same manner Verizon employed to deny Net2000 EEL conversions.

376 *Supplemental Order*, 15 FCC Rcd at 1763.

377 *Supplemental Order Clarification*, 15 FCC Rcd at 9598. The Commission introduced the safe harbor options, stating that: "[w]e find that a requesting carrier is providing a 'significant amount of local exchange service' to a particular customer if it meets one of three [safe harbor options]." (emphasis added).

interpretation of the "significantly local" test would render the Commission's option to convert multiplexed circuits at non-collocation arrangements meaningless, since a carrier would be forced to convert each and every DS-1 circuit riding a DS-3 circuit or other tariffed services in every instance. The CLECs or ILECs that negotiated and proposed the safe harbors did not intend such a result.

By misinterpreting the language of Option 3, the Bureau erred in concluding that allowing DS-1 circuits to be carried on a DS-3 circuit that will continue to carry tariffed traffic "clearly is not permitted under the rules."[378] In so erring, the Bureau wrongfully perpetuates a "prohibition" fabricated by the ILECs to deny conversions of EEL-eligible circuits. In sum, there is no basis under the Commission's Orders or its rules that would permit the ILECs to force requesting CLECs to segregate their EELs and special access circuits on separate DS-3s. Assuming the Commission retains the local use restriction it must clarify that the co-mingling restriction in the safe harbor provisions applies only to the connection of converted loop-transport combinations and not to the provisioning of EEL-eligible circuits over the same facilities used to support additional services.

C. Going Forward, the Commission Should Make Clear that ILECs Must Provide UNEs Subject to a Right to Protest

The Commission should also clarify that ILECs may not refuse to provision requested UNE combinations, or individual UNEs, on the basis of their pursuit of further claims as to why they need not comply with the rules. The Commission should clarify that the ILEC must provision the UNE combination subject to ultimate resolution of any claim pending before the

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[378] *Net2000* ¶ 28.

Commission. Until such time as the regulatory authority concludes that the CLEC's services do not fall within a safe harbor, the CLEC's self-certification must prevail.

IX. PARITY, "BROADBAND," AND INTERMODAL COMPETITION DO NOT JUSTIFY RESTRICTING UNBUNDLING OBLIGATIONS

A. Intermodal Competition

Contrary to BOC arguments in this proceeding, intermodal competition does not provide a justification or lawful basis for ending broadband unbundling obligations. As explained above, Congress did not intend that the end product of the competitive goals of the Act would be a broadband duopoly. Nor do the BOCs provide any suggested basis under the Act for the Commission to terminate or reduce unbundling based on even extensive intermodal competition. Therefore, even if BOCs' arguments concerning the extent of intermodal competition were correct, there would be no basis for ending unbundling obligations. Instead, Congress had a loftier vision – the total eradication of ILEC monopoly and the accompanying ill effects on prices and innovation by means of a thorough-going unbundling of ILEC networks.

Moreover, intermodal competition is completely irrelevant to the statutory "impair" analysis that the Commission must conduct under the Act in order to limit unbundling because none of the providers of intermodal competition, such as it is, offer access over their facilities on a wholesale basis. Indeed, in the *Cable Modem Declaratory Ruling*, the Commission recently determined that cable operators are under no obligation at all to provide access to other

providers, which, by the same logic, would apparently extend to most other non-wireline broadband providers.[379]

In any event, BOCs have failed to show that there is significant intermodal competition for broadband services. In Section VIII, A, 2, above, Commenters explain how BOCs have exaggerated the extent of intermodal competition. Commenters also refer the Commission to comments in the *Wireline Broadband Proceeding* that fully explain that, in fact, the circumstances in which consumers are presented with intermodal choices of service provider are limited.[380] And, there is essentially no intermodal competition for business customers. Therefore, even if intermodal competition did provide a lawful basis for restricting unbundling, or if it were relevant to an "impair" unbundling analysis, there would be no basis at the present time to take any regulatory action based on intermodal competition.

Accordingly, the Commission should reject ILEC arguments that intermodal competition does, or could lawfully, justify restricting unbundling obligations.

B. Parity

Like a broken record, BOCs also endlessly repeat "parity" as if this could also provide a basis for limiting unbundling obligations. As must be obvious, parity appears no where in the statute as a basis for defining or limiting ILEC unbundling obligations, or at all. Therefore, there is no lawful basis for limiting unbundling based on parity.

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379 *Inquiry Concerning High-Speed Access To The Internet Over Cable And Other Facilities; Internet Over Cable Declaratory Ruling,* GN Docket No. 00-185, CS Docket No. 02-52, FCC No. 02-77 (March 14, 2002).

380 *See e.g.*, Reply Comments of ASCENT *et al*, CC Docket No. 02-33, at 41 (filed July 1, 2002); Reply Comments of DIRECTV Broadband, Inc., CC Docket No. 02-33, at 8 (filed July 1, 2002).

Moreover, the Commission should not establish parity as envisioned by the BOCs as a regulatory goal. For BOCs, parity means reductions of regulatory requirements applicable to them to the lowest level applicable to any other industry segment. Thus, for example, BOCs want to be relieved from Title II obligations because non-common carriers are not subject to Title II; from unbundling obligations because cable operators are not subject to unbundling; from *Computer III* safeguards because CLECs are not subject to some of these safeguards; from ARMIS reporting because non-BOCs are not subject to this reporting; and from pricing and tariffing regulation because nondominant carriers are not subject to this regulation. Indeed, the list of BOC complaints could go on *ad infinitum*. Name a requirement, and BOCs will ask to be relieved from it based on parity.

In a nutshell, ILECs, and BOCs in particular, are subject to greater regulatory burdens because they continue to possess market power in the local telecommunications marketplace and have the ability and incentive to thwart competition. This, in turn, if permitted, would do untold harm to consumers and businesses in the form of increased prices, and reduced innovation and choice of service.

Viewed in their correct light, BOC's recent "broadband" public policy initiatives, and the absurd efforts to paint the local market as competitive and themselves as beseiged competitors, are no more than requests for permission to exercise their ability to engage in systematic discrimination against, and to eradicate, competitors. BOCs' explicit requests in the *Wireline Broadband Proceeding* to be relieved from Title II nondiscrimination requirements, and in this proceeding from unbundling obligations, are candid admissions that this is the case.

Accordingly, the Commission should reject BOCs' arguments concerning parity.

C. Promotion of Broadband

The third part of BOCs' litany of arguments seeking to restrict unbundling, and in other proceedings to obtain virtually complete deregulation, is that this relief would promote provision of broadband by both BOCs and CLECs. Commenter's initial comments in this proceeding fully explained why deregulation of BOCs in any respect would not promote broadband.[381] As explained therein, and in these reply comments, CLECs can only realistically transition to facilities-based competition if they may also obtain UNEs. Further, in their comments in this proceeding, BOCs continue to provide no more than unsupported, conclusory allegations to the effect that curtailing unbundling obligations would promote broadband. In fact, the result would be exactly the opposite because this would insulate BOCs from intramodal competitive pressures which are the best incentives for BOCs to innovate and become more efficient. As Bruce Mehlman, the assistant Commerce Secretary, Office of Technology Policy, noted in a recent speech, RBOCs have reduced incentives to invest in broadband data since there is less competition from CLECs.[382] Similarly, Rep. Markey noted in hearings before the Senate Commerce Committee, competition also spurs technological innovation.[383] AT&T conducted a study which unequivocally demonstrated that the highest areas of ILEC

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381 Comments of ALTS *et al.* at 4, 6-18.

382 *Bush Still Undecided on Broadband Policy*, Communications Daily, Vol. 22, No. 100 at 1 (May 23, 2002).

383 Communications Daily, Vol. 22, No. 100 at 5 (May 23, 2002).

investment were in those markets where it was subject to the most UNE-based competition from CLECs.[384]

Moreover, as the Supreme Court in Verizon observed, the simple fact of increased investment since the 1996 Act demonstrates that unbundling does not inhibit investment by either ILECs or CLECs. Since 1997, CLECs have invested $56 billion in building their own networks.[385] CLECs reinvest a much larger portion of their revenues back into their facilities than the RBOCs, 63.7% to 20.6% respectively.[386] ILECs have invested over $100 billion.[387] As the Supreme Court noted, "it suffices to say that a regulatory scheme that can boast such substantial competitive capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities."[388]

Accordingly, the Commission should reject ILEC arguments that restricting unbundling would promote broadband.

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384 Comments of AT&T at 69.

385 Association for Local Telecommunications Services, *The State of Local Competition 2001* at 20 (February 2001) ("*ALTS Report*").

386 *Id.*

387 *Verizon* at 1676, fn. 33.

388 *Id.* at 1676.

X. "NEW INVESTMENT, NEW RULES" WOULD BE ILL-ADVISED AND UNLAWFUL

SBC contends that the Commission should not extend unbundling obligations to new ILEC investment. SBC states that CLECs cannot be impaired in regard to facilities that do not yet exist. It states that since it is not required to create a "superior network" by building new facilities for CLECs it is not required to unbundle those facilities when in fact it builds them.[389] SBC's concrete manifestation of its proposal is to cordon off areas of new ILEC facility deployment such as new commercial parks and residential developments and to preclude CLEC access to ILEC packet technologies and networks.[390] SBC contends that on a going-forward basis, ILECs and CLECs "stand in the same shoes" in regard to facilities deployment.[391]

The Commission should reject this approach because it is flatly unlawful under the Act. The Act requires "nondiscriminatory access" to ILEC network elements. As the Supreme Court noted, it is not enough that the CLEC obtain "the bare provision on an unbundled basis of the network elements it needs to provide a service," the CLEC must enjoy "nondiscriminatory access."[392] As this Commission has recognized, the prohibition against discrimination that appears throughout Section 251 is unqualified and absolute; unlike other statutes, Section 251 does not qualify the term "nondiscriminatory" with the words "undue" or "unjust and unreasonable."[393] It is hard to imagine a more blatant violation of the Act than to afford CLECs

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389 Comments of SBC at 17.

390 *Id.* at 19-20.

391 *Id.* at 14.

392 *Verizon* at 1686.

393 *See Local Competition Order* at ¶ 218.

unbundled access to obsolete portions of the network while reserving advanced network technologies to ILECs. This alone requires the Commission to reject SBC's proposal.

Moreover, the Commission has made clear that it intends unbundling obligations to apply to future networks. Thus, the Commission has determined that its rules should take into account evolving technologies. For instance, the Commission gave "the states the flexibility to ***add*** elements as technology and local market conditions ***change***."[394] In fact, the *UNE Remand Order* sought to build on "technological changes that have occurred in the telecommunications marketplace since the 1996 Act was enacted three years ago."[395] The Commission noted that "[o]ur intention is to ensure that the loop definition will apply to new as well as current technologies, and to ensure that competitors will continue to be able to access loops as an unbundled network element as long as that access is required pursuant to section 251(d)(2) standards."[396]

In addition, as stated elsewhere in these reply comments, immunizing ILECs from unbundling obligations for new investment would not promote broadband but backfire by insulating ILECs from the intramodal competition that provides the best incentive for ILECs to innovate and become more efficient.

Finally, it would be totally impractical to identify new investment. Even SBC acknowledges that it may be somewhat difficult to distinguish between "new facilities, on the

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394 *UNE Remand Order* at ¶ 139 (emphasis added).

395 *Id.* at ¶ 14.

396 *Id.* at ¶ 167.

one hand, and routine upgrades on the other hand."[397] This is an understatement. A classic situation is its Project Pronto deployment. Project Pronto uses a combination of new fiber facilities and existing copper distribution plant. Under SBC's approach, CLECs will get unbundled access to segments of the Project Pronto loop depending on whether it is old or new investment.

The impracticality of segregating old and new facilities is also seen in SBC's proposals. First, in regard to new commercial and residential developments, while the loops will be new they will be routed back to the ILEC's existing wire centers or remote terminals and then routed through the existing network. The vast majority of the facilities servicing the customer will be old investment, but because part of the facility is new, the CLEC may not get access to the customer. In addition, while the development may be new, the ILEC may use dark fiber to serve the new customers; thus, this is technically still old investment. State commissions will be forced to delve in the minutiae of ILEC network deployment to draw lines between what can be unbundled and what cannot be.

The same holds true with packet technologies or packet networks. With increasing convergence, drawing lines between old and new will grow much more difficult. Plus ILECs will be able to preclude CLEC access to customers by manipulating the definition of new investment. For instance, in SBC's Project Pronto architecture, if CLECs are precluded access to such elements as line cards or OCD switches, CLECs will not be able to compete for customers served by SBC's "new" investment. Further, under SBC's proposed network configuration in

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[397] Comments of SBC at 19.

Project Pronto, the ATM switches are "the only means by which the ADSL-based traffic of multiple CLECs can be aggregated and disaggregated."[398] Thus, the OCD will be the only feasible point at which CLECs can get access to the ATM's bit streams coming from their customers.[399] If CLECs cannot gain unbundled access to these switches, the CLEC cannot access the traffic from the customer. Furthermore, SBC may contend that the mere presence of this switch renders the whole loop facility a "new" facility, and that CLECs cannot have access to the loop.[400]

This is a situation where the exception can swallow the rule. SBC contends that "most new investment is therefore investment in network and switches designed to carry data traffic between computers and other digital machines, rather than carry voice traffic between people."[401] As data and voice traffic begin to be provided on the same platforms, however, SBC's new investment rule would preclude CLEC's ability to provide voice service to customers served by SBC's "new" investment.

Accordingly, the Commission should reject the "new investment, new rules" approach.

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398 CC Docket 98-141, *Ex Parte* Letter from DSL Access Telecommunications Alliance to Carol Mattey at p. 4 (April 11, 2000)("*DATA Letter*"). The placement of the OCDs in the central office is an indication of SBC's failure to consider more economical alternatives, such as allowing CLECs to access the bitstream at the DLC, which would preclude the need for a central-office based ATM switch, including the need for a multiport DLC at the CO, and allow for the deployment of fewer ATM switches. *Id.* The failure to implement a cost-effective architecture will surely lead to higher proposed cost-recovery from SBC for use of this functionality. *Id*

399 *Id.*

400 SBC contends that the entire packet network lands on the "new" and therefore "deregulated" side of the line. Comments of SBC at 20.

401 *Id.*

XI. OTHER ISSUES

A. Section 271 Checklist Items Are Independent Requirements

Verizon contends that where an element is no longer required to be unbundled, then "the corresponding Section 271 checklist item is automatically satisfied."[402] Commenters disagree. As discussed in Commenters' initial comments, to the extent that in future proceedings the record establishes that any of the previously established unbundling obligations should be limited or removed, this should not diminish the Commission's review of the corresponding Section 271 checklist items. The Section 271 checklist items are independent requirements that must be satisfied before a BOC may be granted authority to provide interLATA services, regardless of whether the Commission has determined to limit or remove some of those network elements from the national UNE list. As the Commission has previously recognized, providing access and interconnection to elements on the checklist remains an obligation for ILECs seeking long distance approval, regardless whether these elements are unbundled.[403]

In light of the critical importance of ensuring ILEC compliance with the section 271 checklist, the Commission should continue to apply the section 251 requirements for UNEs specified in section 271(c)(2)(B) for purposes of section 271 review, even if it determines in future review proceedings to limit or remove such UNEs from the national list.

B. Petitions for Review Should Be Barred Between Fixed Term Review Periods.

As the Commission found in the *UNE Remand Order,* "[e]ntertaining, on an *ad hoc* basis, numerous petitions to remove elements from the list, either generally or in particular circumstances, would threaten the certainty that we believe is necessary to bring rapid

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402 See Comments of Verizon at 66.

competition to the greatest number of customers."[404] The Commission should reiterate that petitions for review are barred between fixed term review periods in order to establish some modicum of regulatory certainty, and to foreclose yet another potential avenue for ILEC tactics to drive CLECs out of business through sheer exhaustion of CLEC resources.

C. Sunset Periods Are Premature

Verizon advocates a three-year sunset from the effective date of a Commission order in this proceeding "to ensure that CLECs face the proper investment incentives going forward."[405] The majority of commenters who address the issue agree that the Commission should not establish any sunset period for lifting unbundling obligations.[406] Commenters agree with ASCENT that, "[giv]en the complexity of the analysis required in applying the impair standard, the selection of a sunset date would represent the height of arbitrary judgments."[407]

Commenters also agree with the State of California and the CPUC ("California commenters") that "an automatic sunset procedure would be arbitrary, and would fail to take into account the actual state of development of alternative UNE providers," and would "significantly raise the entry barriers faced by CLECs."[408] Similarly, Commenters agree with the California commenters that "[n]on-temporal triggers would inhibit competition in the same manner as temporal triggers. Rules that allow unbundling requirements to change over time, e.g., based on

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403 *UNE Remand Order* at ¶468.

404 *Id.* at ¶150.

405 Comments of Verizon at 70.

406 See, e.g., Comments of the State of California and the CPUC at 15; Comments of ASCENT at 50, citing *Local competition Third Report and Order*, 15 FCC Rcd. 3696 at ¶ 152. ("As the Commission has previously recognized, it would be impossible to predict the date on which the unavailability of a given network element would no longer impair competitors' ability to provide service.")

407 Comments of ASCENT at 50.

the future development of other competitors, would be a tremendous impediment to carriers trying to develop business plans. CLECs need regulatory certainty that the UNEs they are relying on now will still be offered in the future."[409]

Commenters submit that the record reflects that there is no basis for the establishment of any automatic sunset procedure or non-temporal triggers for lifting unbundling requirements.

XII. CONCLUSION

For these reasons, the Commission should defer deliberations in this proceeding pending rehearing or appeal of *USTA*, or otherwise accept the recommendations herein.

Respectfully submitted,

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408 Comments of the State of California and the CPUC at 15.

409 *Id.* at 15-16.

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Dated: July 17, 2002

ATTACHMENT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

DECLARATION OF RICHARD BATELAAN

1. My name is Richard Batelaan. My business address is 320 Interstate North Parkway, Suite 300, Atlanta, Georgia, 30339.

2. I am employed as Vice President—Operations by Cbeyond Communications, LLC ("Cbeyond"). In that capacity I am responsible for all Network Operations, Field Operations, Provisioning, Service Activation, Network Planning, Customer Care, and ILEC Relations for Cbeyond. Prior to joining Cbeyond, I served as Chief Operating Officer (COO) at BroadRiver Communications where I led the Operations and Engineering teams in the launch of Voice, Internet, and Virtual Private Network services. Before joining BroadRiver, I spent twelve years at BellSouth Corporation where I

held various positions within BellSouth Telecommunications, BellSouth Business Systems, and BellSouth.net, including the positions of Chief Operations Officer and VP Operations for BellSouth.net, Director of Operations for Broadband Services deployment, and Director of Engineering for BellSouth's Internet Services deployment. I have also worked at Cisco Systems as an engineer.

3. Cbeyond is a facilities-based competitive local exchange carrier (CLEC), focusing on "bridging the digital divide", using Internet Protocol (IP) architecture to bring all the communication services that a small business needs at affordable prices typically only available to large enterprises. Cbeyond provides an integrated product of local, long distance, Internet access and Internet-based applications such as Unified Messaging, Email, E-Commerce and Web Hosting. The business strategy is to facilitate the movement of business processes via Internet access, making possible electronic communication, collaboration and e-commerce opportunities that will drive the customer's competitive strength and efficiency. Cbeyond uses an integrated IP-based architecture and delivers converged voice, data and integrated network applications over a single platform with seamless integration and delivery.

OVERVIEW AND PURPOSE OF THE DECLARATION

4. The purpose of my Declaration is to provide information regarding the telecommunications network, including access to unbundled network elements

at TELRIC pricing, and to state my company's perspective regarding the deployment of broadband in the marketplace.

5. The Federal Communications Commission ("FCC") has initiated several rulemaking proceedings pertaining to broadband deployment. However, from my perspective the FCC's tentative conclusions are based on faulty assumptions. If adopted, the FCC's tentative conclusions would serve no purpose but to undermine the Commission's long standing goals of promoting competition, would decimate the CLEC and ISP industries, and would leave the small and medium sized business customers that Cbeyond serves without a competitive alternative -- no doubt stifling innovation and raising their rates.
6. It is critically important to understand that the telecommunications network is, and has been, designed for both narrowband and broadband services. The idea that two separate telecommunications networks exist, one for narrowband and one for broadband, is simply not true.
7. The local telecommunications network that supports Cbeyond's narrowband services also supports Cbeyond's broadband services. Cbeyond uses UNE DS-1 loops that exist in the network today to deliver an integrated offering of narrowband voice and high-speed broadband Internet access over the same loop. In fact, DS-1 facilities have existed in the network for over a quarter of a century.
8. The innovative technology that enables such an integrated narrowband/broadband offering is the customer premise equipment and soft switches that Cbeyond has developed with Cisco Systems, Inc. ("Cisco")

along with innovative Quality of Service (QoS) techniques that allow us to prioritize voice and data traffic on a managed network. The quarter of a century old "train tracks" that carry the narrowband voice and high-speed broadband data services are not "new broadband networks".

9. In the normal course of business, ILECs replace old copper plant with fiber plant, and deploy fiber on new routes since it is more cost effective to deploy fiber than it is to maintain and deploy copper plant. The "theory" that fiber deployment is somehow new, and thus, is only being deployed to support a separate broadband network ignores the cost benefits and natural evolution of the network. It also fails to recognize that fiber also supports narrowband voice traffic as part of the single telecommunications network that exists.
10. To limit or restrict access to the ILECs loop and transport network on an unbundled basis, would not only be inappropriate, but it would ignore the fact that fiber deployment, which is cheaper than copper to deploy and maintain, is occurring in the normal course of business. Furthermore, as the Supreme Court recently concluded, the TELRIC pricing standard adequately compensates ILECs for providing CLECs the use of their network.
11. Additionally, Cbeyond does not have a viable source for obtaining DS-1 loops, other than from the ILEC, to serve its small and medium sized business customers. Even if access to sufficient capital existed, which it does not, it would not be economically feasible for Cbeyond to deploy its own DS-1 loops to its target market, customers who have as few as four business lines. While it may be possible for large CLECs to self-provision DS-1 loops to the largest

business customers in certain circumstances, it is not a reality for CLECs, such as Cbeyond, who serve small and medium sized businesses. Further, Cbeyond is not aware of any competitive provider in its markets that deploy wholesale DS-1 loops for CLECs, much less what such a competitor, if it existed, would charge. Therefore, without access to DS-1 UNE loops at TELRIC pricing, Cbeyond would be forced to forego marketing its services to the customers it currently targets, purchase special access DS-1 loops from the ILEC, and move upstream to larger sized customers. This undesired outcome would be to the detriment of the small and medium sized business customers who would be hamstrung with the ILEC as their sole provider.

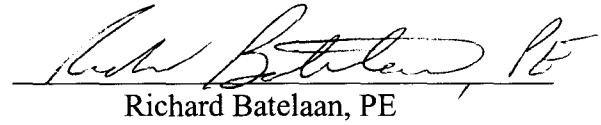
12. Similarly, Cbeyond needs access to DS-1 and DS-3 UNE dedicated interoffice transport. Competitive transport providers do not provide ubiquitous coverage of Cbeyond's serving area, leaving the ILEC as the only provider. This is true even in markets where the Commission has granted ILECs pricing flexibility. Unfortunately, and contrary to what one would expect in a competitive market, BellSouth for example, has raised its special access prices in the markets where it has received pricing flexibility. Such practices illustrate the lack of competition and the market power of the ILECs. Furthermore, even where alternative transport providers do exist, Cbeyond has found that the prices are similar to, and is some cases in excess of, the ILECs special access rates. Having to purchase dedicated transport at these excessive rates would likely force Cbeyond to abandon the smallest customers in its target market

and move upstream – again, an undesired outcome for small business customers.

13. Finally, as recently concluded by the FCC, broadband is being deployed to all Americans in a timely manner. Cbeyond, as well as ILECs and other CLECs, are responding to market forces and are deploying broadband. In fact, every small and medium sized business customer that Cbeyond installs is provided with a high-speed broadband service. Intramodal competition, which is almost exclusively the only competition in the small and medium sized business markets, will continue to bring the benefits of lower prices and innovative service offerings so long as access to the ILECs' high capacity loops and transport (e.g., DS1 loops, DS1 and DS3 transport) are made available to CLECs as unbundled network elements subject to TELRIC pricing.

14. This concludes my Declaration.

15. *Pursuant to 47 C.F.R. § 1.16, I declare under penalty of perjury that the foregoing is true and correct. Executed on: July XX, 2002.*



Richard Batelaan, PE

ATTACHMENT 2

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April 24, 2002

Joseph Kahl
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Dear Joseph Kahl:

Subject: New York PSC No. 10 and No. 8 - Rate Structure Changes
Unbundled Dedicated Transport, Unbundled Loops, EEL and CLEC Switched Service (Interconnection)

The purpose of this letter is to inform you of rate structure changes being made by Verizon for its Unbundled Dedicated Transport, Unbundled Loop, EEL and Interconnection Products to comply with an order issued by the New York Public Service Commission in Case 98-C-1357 - Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements. The effective date for the new rate structure was March 1, 2002. The rate restructure is being reflected on wholesale bills now and will be retroactive to March 1, 2002.

What's Changed for Unbundled Dedicated Transport?

Prior to the restructure, unbundled dedicated transport consisted of two rate elements - a fixed monthly charge and a per mile monthly charge. Mileage was measured between the end points of the circuit (e.g., between the CLEC's switch location and the CLEC's collocation arrangement in a Verizon office).

With the restructure, Unbundled Dedicated Transport will consist of the following rate elements:

- Entrance Facilities
  - Entrance Facility fixed monthly charge
  - Entrance Facility per 1/4 mile monthly charge (applies for DS3 and above)
- Transport
  - Fixed monthly charge
  - Per mile monthly charge

The Entrance Facility rate elements apply for unbundled dedicated transport facilities between the CLEC's switch location and the Verizon serving wire center. The Transport mileage elements apply for unbundled dedicated transport facilities between the CLEC's collocation arrangements in different Verizon central offices.

The following chart summarizes the Unbundled Dedicated Transport Changes:

Unbundled Dedicated Transport Rate Elements	Current	New
Entrance Facility fixed monthly charge	N/A	X
Entrance Facility per 1/4 mile monthly charge	N/A	X
Transport fixed monthly charge	X	X
Transport per mile monthly charge	X	X

DS1 to DS0 Multiplexer

Prior to the restructure, the DS1 to DS0 multiplexer consisted of one monthly recurring charge. As of the restructure, the DS1 to DS0 multiplexer rate elements consist of a monthly recurring charge for the multiplexer common equipment, as well as a monthly recurring charge for each DS0 channel activated on the multiplexer.

Unbundled Loop Non-recurring Charges

Prior to the restructure, the non-recurring charges for Unbundled Loops did not differentiate between a first loop and an additional loop ordered on the same ASR. With the restructure, the following Unbundled Loop non-recurring charges will be assessed on a first and additional loop basis:

- Service Connection - Central Office Wiring
- Service Connection - Other (Provisioning)
- Service Connection - Central Office Wiring - Expedite
- Service Connection - Other (Provisioning) - Expedite
- Dispatch - Outside - First Loop
- Dispatch - Outside - Additional Loop

EEL

The rate elements for EEL arrangements are based on the individual Loop and Transport unbundled network elements that comprise the arrangements. Therefore, the changes noted above for Unbundled Dedicated Transport and Unbundled Loops will apply to EELs. In addition, the rates for the EEL Test Charge elements will be based on New York density zones.

CLEC Switched Service (Interconnection)

CLEC Switched Service, also known as Interconnection or Meet Point A and B, was also affected by this Order, and updates have been made to the PSC #8 Tariff. Highlights of these changes are as follows:

- Usage rates changed from Time of Day to All Hours of the Day
- Transport to the Interconnection POT has been restructured to include an Entrance Facility from the CLEC's premises to the Verizon serving wire center
- Dedicated Transport mileage will now be measured from the Verizon serving wire center to the Verizon tandem or end office, as appropriate
- Introduction of two new Non-recurring Charges - Service Order Charge and a Provisioning Charge

In addition to the rate structure changes identified above, rate changes were made that affect virtually the full range of UNE products and CLEC Switched Service, as specified by the order.

Please contact your Verizon Account Manager if you have questions about the NY changes.

Sincerely,

Georgene Jordan